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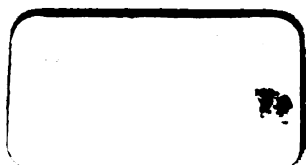
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118

REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF UTAH

(Admitted January 4 1896)

FROM THE

SEPTEMBER TERM 1896 TO THE JANUARY TERM 1897

---

JOSEPH M TANNER

REPORTER

---

VOLUME 14

Being Volume 2 Utah State Reports

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*Rec. Jan. 22, 1898.*

JUDGES AND OFFICERS OF THE SUPREME COURT  
OF THE STATE OF UTAH

DURING THE TIME OF THESE CASES:

---

CHIEF JUSTICE,  
HON. CHARLES S. ZANE.

---

JUSTICE,  
HON. GEORGE W. BARTCH.

JUSTICE,  
HON. JAMES A. MINER.

---

OFFICERS OF THE COURT:

HON. A. C. BISHOP,	-	-	-	Attorney General
LILBURN P. PALMER,	-	-	-	Clerk
JOSEPH M. TANNER,	-	-	-	Reporter

---

TERMS OF COURT:

Second Monday in January.      Second Monday in May.  
Second Monday in September.

## DISTRICT JUDGES.

---

First Judicial District,	-	-	CHARLES H. HART
Second Judicial District,	-	-	HENRY H. ROLAPP
Third Judicial District,	-	{	OGDEN HILES
			JOHN A. STREET*
			MORRIS L. RITCHIE*
			ALBERT G. NORRELL†
Fourth Judicial District,	-	{	ALFRED N. CHERRY†
			ABRAM C. HATCH*
			WARREN N. DUSENBERRY†
Fifth Judicial District,	-	-	EDWARD V. HIGGINS
Sixth Judicial District,	-	-	WILLIAM M. MCCARTY
Seventh Judicial District,	-	-	JACOB JOHNSON

---

\* Appointed in place of Judges Andrew Howat, Le Grand Young, and Ervin A. Wilson, resigned.

† Elected Nov. 5, 1896.

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REPORTS OF CASES

DETERMINED IN

THE SUPREME COURT

OF THE

STATE OF UTAH.

---

IN RE ATWOOD'S ESTATE.

WILL—OMISSION OF DEVISEE—LEGAL PRESUMPTION—ORAL EVIDENCE—COMPETENCY OF WITNESS.

1. In an instance under section 2677, Comp. Laws, where a testator failed to provide in his will for one of his children, the statute presumes that the omission was not intentional.
- 2 The presumption raised by the statute that the omission by a testator to provide for a child was not intentional may be rebutted by extrinsic evidence, whether of declarations of the testator or collateral facts.
3. The devisees, under the law of 1894, amending subdivision 8, § 3877, Comp. Laws, 1888, are not competent witnesses against an omitted child.

(No. 690. Decided July 18, 1896.)

Appeal from the district court of the Third judicial district, Territory of Utah. Hon. S. A. Merritt, *Judge*.

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116	804
14	1
631	435

Petition by Florence Atwood, by her guardian, Amelia A. Sutton, in the matter of the estate of Millen Atwood, deceased. From an order granting the petition, executors and others appeal. *Reversed.*

*Richards & Richards*, for appellants.

That the intention of the testator to omit to provide for his children may be proven by parol evidence, is established by the decision of the supreme court of the United States in the case of *Coulam v. Doull*, 133 U. S. 216. The court there holds that:

Under the statutes of Utah, when any testator shall omit to provide in his or her will for any of his or her children or for the issue of any deceased child, unless it shall appear that such omission was intentional, such child or the issue of such child shall have the same share in the estate of the testator as if he or she had died intestate, and extrinsic evidence is admissible to show that the testator's omission to provide for a child was intentional. *Coulam v. Doull*, 133 U. S. 216.

In the case last cited the supreme court declares that inasmuch as our statute came from Massachusetts the rule of construction adopted by the courts of that state must be applied to it, and that the settled law of Massachusetts is established by the cases of *Wilson v. Fosket*, 6 Met. 400; *Converse v. Wales*, 4 Allen 512; *Buckley v. Gerard*, 123 Mass. 8.

The testimony offered by the estate was competent, including the declarations of the deceased in relation to his intention not to provide for the petitioner. This is the settled rule in Massachusetts, as declared by the supreme court of the United States, and evidenced by the following cases: *Converse v. Wales*, 4 Allen 512; *Buckley v. Gerard*, 123 Mass. 8; *Coulam v. Doull*, 133 U. S. 216, 4 Utah 276; *Brady v. Cubitt*, 1 Doug. 31; *Brush v. Wilkins*, 4 Johns. Ch. 506.

But it is contended that the statute was adopted from California and carries with it the construction placed upon it by the courts of that State. Neither the supreme court of Utah nor the supreme court of the United States concur in that view. In the Coulam case, page 231, the latter court say:

"It is contended that the statutory provision in question was copied from that of California, and that we are bound by the construction previously put upon it by the courts of the latter state. \* \* \* The rule ordinarily followed in construing statutes is to adopt the construction of the courts of the country by whose legislation the statute was originally adopted, but we are not constrained to apply that rule in this instance. The original source of the statute is to be found in the legislation of Massachusetts. The supreme court of California declined to treat the received construction in Massachusetts as accompanying the statute and forming an integral part of it upon a distinction which we do not regard as well drawn. That construction commends itself to our judgment, and we hold that the supreme court of the territory properly applied it."

*Brown, Henderson & King*, for respondent.

It is true that in the Coulam case in the supreme court of the United States, that court held under the former statute of 1876 that the courts of this territory were not bound to follow the California decision because the statute was one which came originally from Massachusetts, and that the Massachusetts decisions would govern instead. The former statute under which the Coulam case arose, was only a single section, which was like a section of both the Massachusetts and California statutes, but it was uncertain which code or which State

the law of 1876 undertook to follow, consequently the supreme court of the United States say that the decisions of the California court are no more binding than the decisions of the Massachusetts court, but since that time the present statute has been borrowed from California *verbatim et literatim*. To verify this we refer the court to Deering's Civil Code, being the second volume of Deering's Annotated Statutes of California (not the code of Civil Procedure) commencing at sec. 1270 and continuing to and including sec. 1377, pages 239 to 257.

You will there see by comparing the present statute under which this case arises, adopted in 1885, and the statute of California are alike in every particular. That the amendments to the California statute which had been adopted up to 1885 were copied right into our law, showing clearly the intent of the legislature of this territory to adopt not the Massachusetts code, but the California code, thereby bringing this within the well understood rule that when one state adopts a statute from another state, when it is determined what state they borrowed it from, they take also the received and enunciated construction of the statute along with it. *Coulton v. Stafford*, 48 Fed. Rep. 266.

And this statute was adopted by this territory after both the Coulam and Gerard cases had been tried, and no doubt with the express intent of adopting the California construction of it. In the present statute there are many expressions and provisions that were not in the statute of 1876, which shows it to be the clear intent and policy not to permit oral declarations when a will is under consideration, and this is clearly apparent and expressly provided for.

In the Stevens case, 83 Cal. 322, the court will see a review of the decisions holding with the California case

in other states where they have similar statutes, but not statutes exactly like the California statute.

ZANE, C. J.:

It appears from the evidence in this record that the late Millen Atwood, of Salt Lake county, made his last will on the 30th day of September, 1890, in which he devised all his real estate, and bequeathed all his personal property remaining after the payment of his just debts and his funeral expenses, to his wife, Relief C. Atwood, and to his three children, Millen M. Atwood, Abbie Angenette Sermon, and Rosalie Esther Kelch; and that he died on the 7th day of December, of the same year, possessed of real and personal property; and that his widow, Relief, and his children named, are still living. It also appears that the will was duly probated, and that Florence Atwood, by her guardian, filed her petition in the office of the clerk of the probate court of said county on the 30th day of March, 1892, in which she alleged, with other facts, that she was of the age of 15 years; that she was a daughter and heir at law of the testator; that he omitted to provide for her in his will; and that it did not appear that such omission was intentional. Upon final distribution of the estate, she prayed that the same portion thereof might be awarded to her that she would have succeeded to if the testator had died intestate. The executors, devisees, and legatees named in the will filed an answer to the petition, denying all its material allegations. This is an appeal from a decree granting the prayer of the above petition.

The principal question presented upon this appeal for our consideration and decision arises upon the ruling of the lower court excluding declarations of the testator made before, about the time of, and after, he executed

his will, offered to prove that the omission to provide for the petitioner, Florence Atwood, therein, was intentional. The petitioner bases her claims upon section 2677, Comp. Laws Utah 1888, viz.: "When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, must have the same share of the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." The meaning of this section is clear. It declares, in effect, that the intent not to provide for a child, or the issue of one, shall not be inferred from the omission to make such provision in his will though he expressly gives all his estate to heirs or other persons named. The statute presumes that he did not intend to omit to provide for a child not named, unless it otherwise appears that he did. The statute presumes that the omission was from mental incapacity, or from inadvertence or mistake. The presumption of a want of intention is contrary to the intent which the language of the will expresses, viz.: to give all his estate to the persons named. If, in construing the language of the will in the light of all the circumstances under which it was made, the court can say it provides for the child, the statute has no application. On the contrary, if, after construing its language under all such circumstances, the lower court can say the child is omitted, the statute does apply, and raises the presumption that the omission was not intentional. The petitioner insists that the intention not to provide, as well as the omission to provide, must appear from the language of the instrument; while the appellants claim that the intent to omit may be shown by parol evidence. The statute does not say from what the intention to omit shall appear. The phrase, "unless it appears that such omission

was intentional," must be held to signify that the intent to omit must appear according to the rules of evidence, not contrary to them; but the statute does not indicate the means by which such intent must appear. As a part of the science of the law, rules have been established by which to determine the competency, the relevancy, and the materiality of evidence offered to prove or disprove disputed facts. Such facts can only be established in courts of justice by such means as the rules of evidence permit.

The language of the testator's will gives his entire estate, after the payment of his debts, to his wife and the three children named. No mention or reference to any other heir is made in it. While it is true that no reference is made in the will to the petitioner, Florence, and that there is evidence tending to prove that she was not the testator's child, in our opinion the weight of the evidence supports the finding of the trial court that she was his daughter. The law quoted above raises the presumption, from the absence of any reference to her in the will, that the omission was not intentional; but the presumption is not conclusive, and it may be overcome by legitimate evidence. It is to overcome this presumption that evidence is admissible in the first instance and afterwards to support it. So that the evidence is not admitted to aid the lower court in the construction of the will. It is admitted solely to rebut the presumption which the law raises. It is admitted for the sole purpose of rebutting a *prima facie* presumption raised by the statute, contrary to the intent which the language of the will expresses. The statute presumes that the testator did not mean what he said, while the evidence offered says he did. Taylor, in his work on Evidence, distinguishes the rule regulating the admission of parol evidence to rebut legal presumptions from those excluding



such testimony to aid the court in the construction of wills or contracts, as follows: "With the view of clearly understanding the subject under discussion, it is essential to distinguish between mere legal presumptions and rules of construction, because, while the former may be rebutted, and, if rebutted, supported also by parol evidence, no evidence can be received on either side if the court, by construction, can arrive at a conclusion respecting the meaning of the instrument." 2 Tayl. Ev. § 1231. The statute quoted does not state a rule of construction, but a rule of presumption. It does not contradict or vary the language of the will or its meaning. It is offered to show that the testator meant what his language expressed. The evidence is offered to rebut the presumption which the statute raises that he did not mean what he said.

In the discussion of the rules respecting the admission of extrinsic evidence as to wills, Abbott says: "The considerations to which I have adverted, however, it will be seen, do not militate against evidence impeaching or disproving the validity of the testamentary act nor, on the other hand, against evidence tending to show that the intention was really just what it expressed on the face of the will." Abb. Tr. Ev. p. 132. We are of the opinion that the presumption raised by the statute, that the omission by a testator to provide for any of his children was not intentional, may be rebutted by extrinsic evidence, whether of declarations of the testator, or collateral facts showing the intention of the testator to have been that which the language of the will expresses. Tayl. Ev. pp. 1043-1046; 1 Greenl. Ev. § 299. The law was so determined by the supreme court of the late territory of Utah, under a statute substantially the same as the one quoted above, in the case of *Coulam v. Doull*, 4 Utah, 267, and affirmed by the supreme court of the

United States (133 U. S. 216). The same doctrine is announced in *Converse v. Wales*, 4 Allen 512. *Lorion v. Keller*, 5 Iowa 196; *Wilson v. Fosket*, 6 Metc. (Mass.) 400; *Buckley v. Gerard*, 123 Mass. 8.

On the trial of the issues raised by the petition and answer in this proceeding, Relief C. Atwood, the widow of the deceased, devisee and legatee under the will, and Millen M. Atwood, Abbie A. Sermon, and Rosalie E. Kelch, children of the testator, also devisees and legatees, testified to certain conversations with the testator, before and after the will was executed, in which he stated that the petitioner, Florence, was not his child, and that he did not intend to provide for her in his will. These statements were excluded by the court, and the respondents to the petition excepted to the ruling of the court, and assign it as error. This assignment of error raises the question: Were such legatees and devisees competent witnesses, under "An act amending subdivision 3 of section 3877 of the Compiled Laws of Utah 1888, relating to witnesses," in force March 7, 1894? Subdivision 3 of section 3877 of the Laws of 1888, which the act of March 7, 1894, proposes to amend, is as follows: "The following persons cannot be witnesses: \* \*

\* Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person, and equally within the knowledge of both the witness and the deceased person." This subdivision applied only to contentions between estates of deceased persons and other parties, not to contentions between heirs, legatees, or devisees as to their respective interests in such estates,

and rights thereto. While the act of 1894 professes to be an amendment of subdivision 3 of the statute of 1888, it covers its entire subject, and is more comprehensive. It is as follows: "A party to any civil action, suit, or proceeding, and any person directly interested in the event thereof, and any person from, through, or under whom such party or interested person derives his interest or title, or any part thereof, when the adverse party in such action, suit or proceeding claims or opposes, sues or defends as guardian of any insane or incompetent person, or as the executor or administrator, heir, legatee or devisee of any deceased person, or as guardian, or assignee or grantee, directly or remotely, of such heir, legatee or devisee as to any statement by, or transaction with, such deceased, insane or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of both witness and such insane, incompetent or deceased person, unless such witness be called to testify thereto by such adverse party, so claiming or opposing, suing or defending in such action, suit or proceeding." This act may be more easily understood with respect to the case in hand by omitting a part of its language: "A party to any \* \* \* proceeding, \* \* \* when the adverse party claims or opposes \* \* \* as heir, legatee or devisee of any deceased person, \* \* \* person as to any statement by such deceased \* \* \* person \* \* \* which must have been equally within the knowledge of \* \* \* the witness and such \* \* \* deceased person, unless such witness be called by such adverse party."

The petitioner was heir. The parties opposing were heirs, legatees, and devisees. The statements were by the testator, and expressed an intention not to provide for the petitioner in his will, and were, in effect, favor-

able to his heirs named in the will, and unfavorable to the petitioner. Such intent was not equally within the knowledge of the witnesses and the deceased testator, it is true. But the witnesses belonged to the class of persons named by the statute as disqualified; and they appear to be within the reason of the rule of exclusion established by the statute, because they were testifying to statements of a deceased person made in their favor. There is no other means of showing what the testator did say, or of contradicting the witnesses. We are of opinion that there was no error in the ruling of the court in excluding the statements of the witnesses named above. We see no legitimate objection to the competency of the other witnesses called by the appellants, or to their testimony, because of irrelevancy or immateriality, or otherwise.

For the reasons stated, the decree of the court below is reversed, with costs, and that court is directed to grant a new trial.

MINER, J., and STREET, District Judge, concur.

JOHN FEATHERSTONE, RESPONDENT, v. S. P. EMERSON ET AL., APPELLANTS.

MORTGAGES—SUBROGATION—WHEN ALLOWED.

1. Page borrowed from Featherstone \$2,000, which was secured by mortgage upon land which was afterwards sold to Brown and Emerson for \$5,000. Brown and Emerson paid \$1,000 cash, and agreed to pay the \$2,000 mortgage thereon, and gave a purchase-money mortgage for \$2,000 back on the property to Page. Emerson afterwards paid \$1,200 on the last mortgage, and Brown, with the tacit agreement with Page that it should be a part of the old obligation, gave a new mortgage on his undivided half of the land for \$800, which was given as a purchase-money mortgage, and Page released the \$2,000 mortgage. Emerson had notice of the transaction. The \$800 mortgage was assigned to Featherstone, the plaintiff, who held both mortgages. After Featherstone had foreclosed the \$800 mortgage, and obtained title to the undivided half of the land, Emerson paid \$1,100, and tendered plaintiff the balance due on the \$2,000 mortgage that Brown and Emerson had jointly assumed, provided that plaintiff would assign to Emerson the \$2,000 mortgage. Plaintiff refused the tender or to make the assignment, but offered to assign the \$2,000 and the \$800 mortgage to Emerson, upon payment of the full amount due on both mortgages, which Emerson refused to do. *Held*, that Emerson was surety for Brown as to at least one-half of the two mortgages given and assumed by both; that the equities of Featherstone, as assignee of the \$800 purchase-money mortgage given by Brown to Page, were superior to Emerson's right; that Emerson was not entitled to be subrogated, without having paid or offered to pay the \$800 mortgage; that, as between Brown and Emerson, both were bound to contribute towards the discharge of the common joint burden; that, when purchase money is the consideration of the instrument, it will continue to be the consideration of any other instrument, if expressed therein, executed

by agreement in substitution of the old one, unless superior equities intervene, which have not in this case.

2. The release of the \$2,000 mortgage, which Brown and Emerson were both obligated to pay, on payment of \$1,200 by Emerson, and the giving of the \$300 purchase-money mortgage on one-half of the land by Brown to Mrs. Page, upon such release, coupled with the tacit agreement that such new \$800 mortgage should be a part of the former obligation, and the express agreement that it should be a purchase-money mortgage, with notice to Emerson, was for Emerson's benefit to the amount of \$800, and should not be used as a weapon in the hands of Emerson to defeat Mrs. Page, nor her assignee, who succeeds to her rights in the mortgage, from recovering the purchase price of the land sold, without first paying or offering to pay the same.
3. The property was the primary fund to meet the obligation of both, and Mrs. Page held the mortgage as a purchase-money mortgage, and transferred her right to the plaintiff, whose equities are superior to those of Emerson or Brown, until tender or payment of the entire debt arising from the purchase.

(No. 687. Decided July 23, 1896.)

Appeal from the district court, Third judicial district, Territory of Utah. Hon. S. A. Merritt, *Judge*.

Action by John Featherstone against S. P. Emerson and others. From a judgment for plaintiff, defendant Emerson appeals. Affirmed. The facts are set out in the opinion of the Justices.

*Breeze & Burris* and *Moyle, Zane & Costigan*, for appellant.

As between purchasers in common of an estate bound by a joint lien or mortgage, each is bound to contribute only his proportion towards the discharge of the common burden and as to the remainder is to be considered simply as a surety; and if one of them is obliged to pay the

whole amount to protect his interests, he will be subrogated to the rights of the owner of the lien or of the mortgage, even without an express assignment of the lien or mortgage, and will be protected as far as equity can protect him. Subrogation depends not upon contract but upon natural justice, and "equality is equity." *Gearhardt v. Jordan*, 11 Penn. St. Rep. 325; *Aiken v. Gale*, 37 N. H. 501; *Hubbard v. Mill Dam Co.*, 20 Vt. 402; *Simpson v. Gardiner*, 97 Ill. 237; *Laylin v. Knox*, 41 Mich. 40; *Cornell v. Prescott*, 2 Barbour 16, *Ellsworth v. Lockwood*, 42 N. Y. 89-97; *Fisher v. Dillion*, 62 Ill. 379; *Young v. Morgan*, 89 Ill. 199; *Matthews v. Aiken*, 1 Comstock (N. Y.) 595; *Williams v. Perry*, 20 Ind. 437; *Duncan v. Drury*, 9 Penn. St. 332; *Champlin v. Williams*, 9 Penn. St. 341; 3 Pomeroy's Equity Jurisprudence (1st Ed.), secs. 1211, 1212, 1220, 1922, and notes; 2 Brandt on Suretyship (2d Ed.), § 302, § 309, § 315; Harris on Subrogation, secs. 103 and 143.

"The fact that the mortgage which the vendor takes at the time of the conveyance is expressed to be for the purchase money of the land is none the less a waiver of his vendor's lien." *Avery v. Clark*, 87 Cal. 619; *Baum v. Grigsby*, 21 Cal. 173; *Camden v. Vail*, 23 Cal. 633; *Gaylord v. Knapp*, 15 Hun. (N. Y.) 87; *Pease v. Kelly*, 3 Oregon 417; *Rhynier v. Frank*, 105 Ill. 326; Pomeroy's Equity Jurisprudence (2d Ed.) § 1252 and cases collected in note p. 1928.

Even if the Pages had not waived their vendor's lien by taking the \$2,000 and the \$800 mortgages and by canceling the \$2,000 mortgage, that lien existed only for them and was lost by the assignment of the note and mortgage to the plaintiff Featherstone; for on principle and by the great weight of authority a vendor's lien is a strictly personal right, and is therefore not assignable. *First Nat. Bk. v. Salem Flour Mills Co.*, 39 Fed. Rep. 89;

*Hammond v. Peyton*, 34 Minn. 529; *Keith v. Horner*, 32 Ill. 524; *Bonnell v. Holt*, 89 Ill. 71; *Gruhn v. Richardson*, 128 Ill. 178; *White v. Williams*, 1 Paige (N. Y.) 502; *Jackman v. Hallock*, 1 Ohio 318; *Baum v. Grigsby*, 21 Cal. 173; *Avery v. Clark*, 87 Cal. 619; 2 Jones on Liens § 1092 and cases collected in notes.

Featherstone, the plaintiff here, was not the vendor, and of course cannot avail himself of the equities embraced in a vendor's lien.

Even if a vendor's lien were assignable, the assignment of the \$800 note and mortgage to the plaintiff would not and did not assign the lien to him.

The assignment (p. 50 of the abstract) of the note and mortgage of \$800, does not purport to assign the vendor's lien, and there is no evidence or finding that it does do so. We submit that on the law it does not do so. *White v. Williams*, 1 Paige (N. Y.) 502; *Jackman v. Hallock*, 1 Ohio Rep. 318; *Wellborn v. Williams*, 9 Ga. 86.

The doctrine of vendor's lien is indefensible and should not be recognized and enforced where it has never been adopted. *Ahrend v. Odiorne*, 118 Mass. 261; *Philbrook v. Delano*, 29 Me. 410; *Kauffelt v. Bown*, 7 S. & R. (Pa.) 64; *Hammond v. Peyton*, 34 Minn. 529; *Hiesler v. Green*, 48 Pa. St. 96; *Edmunster v. Higgins*, 6 Neb. 265. We submit the doctrine has not been and should not be adopted in Utah.

The contention of the plaintiff Featherstone that the \$800 mortgage of October 26, 1891, is superior in equity to the \$2,000 mortgage of Dec. 17, 1890, or at least to the rights of Emerson therein acquired by subrogation, because it is expressed to be for the unpaid purchase money, and therefore is a purchase-money mortgage or is in the nature of a vendor's lien is unsupported by the law; for a purchase-money mortgage given to the vendor



or a vendor's lien retained by him is not so peculiarly sacred that it is superior in equity to a mortgage previously given by the vendor on the same property, and since it is not superior in equity to such mortgage it is not superior to the rights acquired in such mortgage by subrogation. Brandt on Suretyship (2d Ed.), § 315.

*Frank Pierce*, for respondent.

*Subrogation is a creature of equity.*

This right does not grow out of contract relations, but depends upon principles of natural justice and equity. It is governed by no strict code or formal rules. Each case makes its own appeal to the court and wins on its inherent equity and justice. So far we agree with counsel for the appellant. To the many authorities cited in support of the above doctrine on pages 6 and 7 of his brief, we take pleasure in adding the following: II Brandt on Suretyship, sec. 298; Harris on Subrogation, secs. 162-163; *Exchange Co. v. Bayless*, 21 Southeastern 279; *Spaulding v. Harvey*, 28 Am. St. Rep. 176; 129 Ind. 106; *Cheesebro v. Millard*, 7 Am. Dec. 494; *Pease v. Egan*, 131 N. Y. 262; *Insurance Co. v. Fidelity Co.*, 123 Pa. St. 523.

*A pro tanto subrogation is never allowed.*

Emerson offers to pay only part of the obligation which he incurred to Mrs. Page on August 26, 1891, but seeks subrogation. He seeks a *pro tanto* subrogation.

Subrogation cannot be enforced until the whole debt is paid to the creditor. Emerson must extinguish his obligation in full before he invokes this extraordinary remedy. Until the creditor is paid there cannot be any interference with his securities which might prejudice or embarrass him in the collection of the residue of his claim. In the case at bar the property is the primary

fund to meet the *obligation*, that is, *payment of the purchase-money*. II Brandt on Suretyship, sec. 306; *Exchange Co. v. Bayless*, 21 Southeastern 279; II Brandt on Suretyship, secs. 308, 321; *Wilcox v. Fairhaven Bank*, 7 Allen 270; Harris on Subrogation, sec. 195; II Jones on Liens, sec. 1122; III Pomeroy Equity Jurisprudence, sec. 1220; *Hollingsworth v. Floyd*, 2 H. & G. (Md.) 87; *Kyner v. Kyner*, 6 Watts (Pa.) 221; *Receivers v. Wortendyke*, 27 N. J. Eq. 658; *Bank of Penn. v. Pontius*, 10 Watts. (Pa.) 148; *Mages v. Legelte*, 48 Miss. 139; *McConnell v. Beatty*, 34 Ark. 123; *Schoonover v. Allen*, 40 Ark. 132; *Zook v. Clemmer*, 44 Ind. 15.

*Subrogation is never invoked to defeat or interfere with superior or equal equities.* *Exchange Co. v. Bayless*, 21 Southeastern 279; III Pomeroy's Equity Jurisprudence, sec. 1419, and note.

No equities were lost by the assignment of the \$800 mortgage to plaintiff. The assignment of the \$800 note and mortgage transferred to the plaintiff all rights which Mrs. Page had. An express lien, which is created by the parties by agreement, as a mortgage for the purchase money, as in the case at bar, is always assignable, but it is held by many authorities, although there is a conflict in the authorities, that an implied lien which arises by operation of law, is not assignable. II Warvelle on Vendors, 736; *Stratton v. Gold*, 40 Cal. 778; *Lewis v. Hawkins*, 13 Wall. 119; *Avery v. Clark*, 87 Cal. 625; *Taylor v. McKinney*, 20 Cal. 618; II Jones on Liens, sec. 1119.

The authorities cited by counsel deal with implied liens which the law gives the vendor after he has parted with his legal title and has made no express agreement for security for the unpaid purchase money.

The term purchase money as used in purchase-money mortgages, means money paid for land or the debt created by the purchase of land. When purchase money is the consideration of an instrument it will continue to be

the consideration of any other instrument executed in substitution of the old one. Hence the purchase-money obligation of \$2,000 of August 26, 1891, was carried into the \$800 mortgage and no rights were waived. The \$800 mortgage afterwards given was for part of the same purchase money. The court so finds. 19 Am. & Eng. Enc. 583; *Austin v. Underwood*, 37 Ill. 438; *Kimball v. Esworthy*, 6 Ill. App. 517; *Flanagan v. Cushman*, 84 Texas 241.

A mortgage which is given subsequently to the conveyance of the land and execution of the mortgage thereon to secure the purchase money and which is intended to be substituted in place of such money, is a mortgage for purchase money, although by its terms it may extend the time of payment to a longer period. *Jones v. Parker*, 51 Wis. 218; *Pratt v. Topeka Bank*, 12 Kan. 570.

It is a well settled principle that a purchase-money mortgage given by the mortgagor to the vendor of land to secure a balance of unpaid purchase money, has priority over every claim or lien of any kind arising through the mortgagor, to the extent of the land purchased. 19 Am. & Eng. Enc. 575.

Nearly all of the decided cases recognize that a mortgage for purchase money, whether it be expressed in the mortgage or not, is an equity in the vendor equal and in many cases superior to a common law vendor lien. *Clark v. Brown*, 3 Allen 509; *Ellis v. Horrman*, 90 N. Y. 466; *Spring v. Short*, 90 N. Y. 538; *Wilson v. Smith*, 52 Hun. 171; *Curtis v. Root*, 20 Ill. 518; *Christie v. Hale*, 46 Ill. 117; *Austin v. Underwood*, 87 Am. Dec. 254; *Bolles v. Corli*, 12 Minn. 113.

For the purposes of subrogation there is no difference between a vendor's lien and a mortgage given back to secure purchase money. II Warvelle on Vendors, 737.

MINER, J.:

It appears from the record that on December 17, 1890, the defendants Emily S. Page and E. J. Page borrowed from the plaintiff, Featherstone, the sum of \$2,000, and gave him their note secured by a mortgage on the property in question. On August 26, 1891, the defendants Page and wife conveyed by warranty deed the said mortgaged property to defendants Brown and Emerson for the sum of \$5,000, subject to the \$2,000 mortgage of December 17, 1890, which the grantees jointly agreed to assume and pay. Brown and Emerson also paid to Page \$1,000 in cash, and executed a purchase-money mortgage back to Page upon the property purchased for the sum of \$2,000, as consideration for the premises conveyed to them. At the maturity of the \$2,000 mortgage, dated August 26, 1891, defendant Emerson paid \$1,200 thereon, and Brown gave to Page a new purchase-money mortgage, dated October 6, 1891, upon his undivided half of the premises, for \$800, to secure a part of the said purchase price, and Mrs. Page released the said \$2,000 mortgage of August 26, 1891, of all of which Emerson had notice at the time. On March 1, 1892, Page assigned the said \$800 mortgage to plaintiff Featherstone, so that Featherstone then held both mortgages upon the property, to wit, the \$2,000 mortgage which both Brown and Emerson were obligated to pay, and the \$800 purchase-money mortgage which Brown gave to Page upon his undivided half of the premises in order to release the former \$2,000 mortgage upon which Emerson was jointly liable. "On the 17th day of January, 1893, there was due upon the note and mortgage of \$2,000, given by said Emily S. Page to John Featherstone, December 17, 1890, the sum of \$2,200, including interest, and thereafter, upon said day, said S. P. Emerson paid to the plaintiff \$1,100 thereon, and tendered to plaintiff the balance due thereon if plaintiff would assign to Emerson

the mortgage of \$2,000. Plaintiff refused to accept said tender or make said assignment, but offered to assign said mortgages of \$2,000 and \$800 to said Emerson, upon payment to him of the full amount due upon both of said mortgages, which said Emerson refused to do." In answer to Emerson's cross complaint, plaintiff alleges that the \$800 note and mortgage, given by Brown to Mrs. Page as part of the purchase-money mortgage, and which was assigned to plaintiff, had been foreclosed, and plaintiff had purchased Brown's interest in the land under such foreclosure; and it appears that the plaintiff was in the possession thereof, and no adverse claim had been set up in the foreclosure proceedings by Emerson.

The errors assigned by the defendant Emerson raise the question of his right to subrogation to the former rights of the plaintiff in the \$2,000 mortgage of December 17, 1890, as against Brown and Mrs. Page, and her assignee, the plaintiff, and the superiority of that right over the rights of Featherstone acquired under the \$800 note and mortgage, although no tender or payment of the \$800 mortgage had been made. Emerson claims that he is subrogated to the prior incumbrance to which the \$800 incumbrance is inferior. The plaintiff contends, and the trial court held, that while Emerson was a surety for Brown as to one-half of the \$2,000 mortgage of December 17, 1890, the equities of Featherstone, the plaintiff, as assignee of the \$800 mortgage of October 26, 1891, given by Brown to Page for unpaid purchase money, was superior to Emerson's right, and that Emerson was not entitled to subrogation without having paid or offered to pay the \$800 mortgage. The court decreed a dismissal of Emerson's cross complaint, and gave judgment for the plaintiff. As between Brown and Emerson, who were purchasers of a common estate, and bound by a joint obligation created thereon by them-

selves, each was bound to contribute his proportion towards the discharge of the common burden, and either could be compelled to discharge the debt. It was a joint obligation. If Emerson was compelled to pay the whole to protect his rights, he could be subrogated to the rights of the owner of the security, as against Brown's interest, upon tender or payment of the debt secured, if no other or greater equities intervened. The plaintiff, who was the owner of the \$2,000 mortgage of December 17, 1890, is first in time and equity as to that mortgage, because he loaned his money on the property before any other rights attached. The obligation which Emerson and Brown took upon themselves was to pay \$5,000 for the property. They purchased as tenants in common, each to take an undivided one-half interest; but they voluntarily obligated themselves jointly to pay the full amount. As to the holder of the obligation, they are the principal debtors; as to themselves they were sureties for each other for one-half of the debt. Their promise to pay the purchase money is evidenced by the \$2,000 mortgage of December 17, 1890, which they assumed and agreed to pay, and by the \$2,000 note and mortgage of August 26, 1891, which they gave, and which both agreed to pay. These form the remaining obligation, and as to each other they were of equal equity, amounting, in fact, to one debt of equal importance. As between Brown and Emerson, the first mortgage has no equity in advance of the second.

A purchase-money mortgage is a mortgage upon real estate, given upon a conveyance thereof, to secure the balance of the purchase money remaining unpaid. It is the debt created by the purchase. Such purchase-money mortgage usually has the priority over other claims or liens of any kind arising through the mortgage.

to the extent of the land purchased, except as it may be affected by the recording laws; and when the purchase money is the consideration of the instrument, it will continue to be the consideration of any other instrument executed by agreement, in substitution of the old one, even though a part of the purchase money on the original mortgage has been paid before the execution of the second, unless other superior equities have intervened, which we do not find to exist in this case. 19 Am. & Eng. Enc. Law, 583, 575-578; *Austin v. Underwood*, 37 Ill. 438; *Jones v. Parker*, 51 Wis. 218; *Pratt v. Bank*, 12 Kan. 437; *Flanagan v. Cushman*, 48 Tex. 241; 2 Warv. Vend. pp. 736, 737.

The payment by Emerson of \$1,200 on the \$2,000 mortgage of August 26, 1891, paid so much of the joint debt. The fact that Mrs. Page released the \$2,000 mortgage of August 26, 1891, on payment of the \$1,200 by Emerson, and the giving back of the purchase-money mortgage of \$800 by Brown on his undivided part of the land, with the tacit agreement that such mortgage should be a part of the obligation of August 26, 1891, and the express agreement that it should be a purchase-money mortgage, of all of which Emerson had notice at the time, was to Emerson's benefit to the amount of \$800 remaining unpaid, and should not be used as a subrogation weapon by Emerson to defeat Mrs. Page, nor the plaintiff, who succeeds to her rights in the mortgage, from recovering the purchase money actually due for the purchase price of the land sold, without first paying or offering to pay the same. *Jones Mortg.* § 229, and cases cited; 2 Warv. Vend. 736; 2 *Jones, Liens*, § 1116; *Hurlbert v. Weaver*, 24 Minn. 30; 19 Am. & Eng. Enc. Law, 583. As a general rule the right of subrogation cannot be enforced until the whole debt is paid or tendered to the creditor. Emerson should have extinguished the debt before invoking the remedy sought.

Until the creditor is paid, there cannot ordinarily be any interference with his security which might prejudice or embarrass him in collecting the balance of his claim. The property was the primary fund to meet the obligation, and Mrs. Page held the purchase-money mortgage as such, and transferred her right to the plaintiff. 3 Pom. Eq. Jur. § 1619; Sheld. Subr. §§ 127, 176, 177; *Investment Co. v. Bayless* (Va.) 21 S. E. 279; 2 Brandt, Sur. §§ 306, 308, 321, 446; 2 Warv. Vend. §§ 736, 737; *Grubbs v. Wysors*, 32 Grat. 127; *Clark v. Warren*, 55 Ga. 575.

The equity of Mrs. Page for the unpaid purchase-money mortgage of \$800 is therefore superior to the equities of both Emerson and Brown, and, until she was paid in full, neither has any just equitable right against her, or her assignee, the plaintiff. Emerson, as surety for Brown, has an equity superior to that of Brown in the property, and, as against Brown, this equity could have been invoked after payment of the whole debt. Until payment, the plaintiff's equity is superior to the defendant's, Mrs. Page's equity is superior to that of Emerson, and Emerson's to that of Brown. We are of the opinion that the judgment of the court below should be affirmed. It is affirmed accordingly.

BARTCH, J., concurs.

ZANE, C. J. (dissenting):

It appears from the record in this case that defendant Emily S. Page, on December 17, 1890, borrowed \$2,000 of the plaintiff, John Featherstone, and that on the same day she gave her note and mortgage on real estate owned by her to secure the same; that the note was made payable in two years from its date, and drew interest at 1 per cent per month; that the mortgage was duly recorded, and provided for the payment of an attorney's fee of \$100



in case suit should be brought to collect the same. It also appears that the defendant Page, on August 26, 1891, conveyed the land by a sufficient deed to defendants Robert Brown and S. P. Emerson, for the consideration of \$5,000; that the grantees paid at the time \$500 each, and assumed the payment of the note mentioned above, and to secure the remainder they gave their note for \$2,000, and a mortgage on the same property; that the note was payable in 60 days from its date, and drew interest at 1 per cent per month, and provided for the payment of 10 per cent thereon as an attorney's fee, in case suit should be brought to collect it; that this mortgage was also recorded; that the above-mentioned deed was in express terms made subject to the mortgage first named; and that each of the defendants took an undivided half interest under the deed, and agreed between themselves that they should respectively pay one-half of the purchase price. It also appears that on October 26, 1891, when the second note became due, Emerson paid \$1,000, his half of it, and \$200 of Brown's share, making \$1,200, and that Brown gave his individual note for \$800 for the balance due Mrs. Page. In consideration of the payment of this \$1,200, Emerson was expressly released from further liability for this \$2,000 note, and the mortgage to secure it was satisfied. Heath, Featherstone's agent, testified as follows: "Q. Was the \$2,000 mortgage paid, and, if so, how? A. It was paid by Emerson sending me a check for something over \$1,200." To another question the witness further stated that Brown gave his individual note for the remaining \$800, secured by a mortgage on Brown's undivided half of the land. Witness was further examined as follows: "Q. State whether this 60-day \$2,000 mortgage was paid off and released at that time. A. It was; the first short mortgage was paid." Counsel for Featherstone asked: "Do you know? A. Yes. Q.

Did you send this note and mortgage, after it had been released, to Emerson? A. I think I did. Q. The note was not paid in cash, was it? A. No, sir. Q. Just as you have stated? Yes, sir." It also appears that Emerson produced the \$2,000 note and mortgage in evidence on the trial, and that after this \$2,000 note had been paid, as shown by the evidence, and the mortgage to secure it had been satisfied, it was satisfied on the record as follows: "Salt Lake City, Utah, Nov. 2, 1891. Declared satisfied by entry on margin of the record by Emily S. Page." This entry on the margin of the record was duly signed by the recorder as the statute required. It also appears that after this \$2,000 note had been paid, and the mortgage to secure it had been released, and both had been returned to Emerson, that Featherstone purchased the \$800 note of Mrs. Page, paying for it \$700. It also appears that Emerson, before this suit was brought, paid Featherstone one-half of the original \$2,000 note given by Mrs. Page to him, with all interest due, and afterwards tendered the balance remaining due on that note, and an attorney's fee of \$100, but that Featherstone refused to accept it and return the original \$2,000 note unless Emerson would also pay the \$800 note given by Brown to Mrs. Page, to which Emerson was not a party. It also appears that Featherstone foreclosed the \$800 mortgage, and obtained Brown's individual one-half of the land, but that Emerson was not a party to this foreclosure suit, and it does not appear that he had any notice of it. It also appears that Featherstone afterwards instituted his action against Emerson and Brown to foreclose the mortgage given to him by Mrs. Page.

In view of the foregoing facts, Emerson filed his answer to the complaint of Featherstone, and filed his cross complaint against Featherstone and Brown, in which he alleged the foregoing facts, and asked to be subrogated

to Featherstone's rights under the mortgage which he had tendered payment of in full. Emerson and Brown having purchased the land, and each having taken an undivided one-half of it, in the absence of any express agreement, they were, as between themselves, liable to pay one-half of the purchase price, and were respectively bound to pay one-half of the mortgage to Featherstone. As between themselves, each was bound to contribute his proportion to discharge the common burden, and beyond that the law regarded each as the surety of the other for the payment of the other's part, and, if one should pay more than his part, he would stand in the place of the satisfied creditor to the extent of the excess paid. The creditor has no right to object, and the joint debtor cannot complain, because his surety is in that way enabled to collect a just debt against him. Such right of subrogation is based upon the plainest principles of equity. *Gearhart v. Jordan*, 11 Pa. St. 325; *Simpson v. Gardiner*, 97 Ill. 237.

But it is insisted that Emerson cannot be subrogated to the rights of Featherstone by virtue of the first mortgage for \$2,000 given by Mrs. Page to him, because he became the assignee of the mortgage to secure the \$800 note by Brown to Mrs. Page. The subrogation is only asked to the extent that Emerson is compelled to pay Brown's portion of the first note. He was not bound to pay the \$800 note. He was not a party to it. Mrs. Page would not rely on her vendor's lien when she sold the land to Emerson and Brown, and she took their note for the unpaid purchase price, and a mortgage to secure it. In accepting that mortgage she waived her vendor's lien, if she had any. All her equities, if any, because of the consideration of the note being a portion of the purchase price, were merged in that mortgage. "When any other independent security is taken as a

mortgage on the land, or upon other land, or the personal responsibility of a third person, the lien is held to be waived, unless there is at the time an express agreement for its retention. \* \* \* The fact that the mortgage which the vendor takes at the time of the conveyance is expressed to be for the purchase money of the land, is none the less a waiver of his vendor's lien." *Avery v. Clark*, 87 Cal. 619; *Baum v. Grigsby*, 21 Cal. 173; *Camden v. Vail*, 23 Cal. 634; *Gaylord v. Knapp*, 15 Hun. 87; 3 Pom. Eq. Jur. (2 Ed.) 1252. In the case of *Ryhiner v. Frank*, 105 Ill. 331, the court said:

"We do not apprehend that there could be any going back to the time of McCoy's purchase of the lots on January 20, 1879, and asserting a lien on the premises from that time as a vendor's lien for the purchase money, but that the taking of the trust deed would be a waiver of the implied vendor's lien, and that such deed would be the sole measure of the vendor's right in the land for the security of payment of the purchase money." In the case of *Pease v. Kelly* the court said: "A mortgage is a more certain and definite security than a vendor's lien. The lien exists if there is no higher security, but we think that the taking of a mortgage, which is an open and public lien, is a waiver of the vendor's lien, and we think that both liens cannot exist at the same time, and such seems to be the well-established doctrine of the cases." 3 Or. 417.

Mrs. Page having waived her equities against the land in question, except such as she obtained by virtue of her second mortgage, which does not profess to be for the purchase price, she had none to transfer, except such as the mortgage expressly gave her; and this mortgage, as it appears from the evidence above referred to, she expressly released on the 26th day of October, 1891, in

consideration that Emerson would pay the one-half of the note secured by it, and \$200 on Brown's half, and by the execution of an individual note by Brown for the balance, and a mortgage on his half to secure it. The second note for \$2,000 was regarded as paid, and the mortgage satisfied on the record by Mrs. Page, and both note and mortgage were delivered to Emerson in pursuance of the understanding of the parties, and he, having them in possession, produced them in evidence on the trial. Mr. Emerson was not a party to this \$800 note, and it was expressly understood that he was not to be. How, then, can he be held in any way for the payment of that note to Mrs. Page or her assignee? Her assignee, who shaved the note at much less than the amount due, was informed of all these facts when he afterwards took an assignment of it, for the public record disclosed the fact that the \$2,000 note had been satisfied, and that Emerson was not on the \$800 note, and that the mortgage to secure it was against Brown alone, and on his individual half of the land. There can be no doubt as to the payment and satisfaction of the second \$2,000 mortgage, and the fact that Emerson was not bound to pay the \$800 note.

But if the vendor's lien, or any equity against Emerson, with respect to the land, had existed outside of the mortgage, and had not been waived by it, such lien or equity did not pass to Featherstone by virtue of the assignment of Brown's \$800 note. The great weight of authority is to the effect that it does not. Where such lien is recognized, it is to the vendor, and does not pass to his assignee. In the opinion of the court by Chief Justice Field, in the case of *Baum v. Grigsly*, 21 Cal. 173, the court said: "Indeed, with the exception of decisions of two or three states, the adjudged cases are uniformly against any assignment of the lien by a transfer of the note or personal security of the vendee. \* \* \* The

assignee of a note given for the purchase money stands in a very different position. He has not parted with the property which he seeks to reach in consideration of the note which he has received. He has never held the property, and has therefore no special claims upon equity to subject it to sale for his benefit. \* \* \* 'The vendor's lien,' says the supreme court of Tennessee, 'is nothing more than a mere equity, capable of acquiring the force and effect of a lien, under certain circumstances, in the event of the nonpayment of the purchase money.' \* \* \* But this lien is a mere personal equitable right of the vendor, and is not assignable. It looks only to the vendor, and does not pass to the assignee of the vendee's obligation for the consideration, and, consequently, cannot be enforced in his favor." From the large number of cases we cite the following: *First Nat. Bank v. Salem Capital Flour-Mills Co.*, 39 Fed. 89; *Hammond v. Peyton*, 34 Minn. 529; *Jackman v. Hallock*, 13 Am. Dec. 627; 2 Jones, Mortg. 1092; *Keith v. Horner*, 32 Ill. 524; *Bonnell v. Holt*, 89 Ill. 71; *Gruhn v. Richardson*, 128 Ill. 178; *White v. Williams*, 1 Paige 502; *Wellborn v. Williams*, 52 Am. Dec. 427.

But it is claimed that the subrogation of Emerson to the rights of Featherstone under the first mortgage, without paying the later mortgage given by Brown alone to Mrs. Page, and assigned to Featherstone, would be a subrogation *pro tanto*. But that would not be a *pro tanto* subrogation. The second \$2,000 note and mortgage, for the remainder of which the \$800 note and mortgage were given, were paid as to Emerson, and satisfied and given up to him, and Mrs. Page had no further claim on him, legal or equitable, after the \$800 note given by Brown. To hold that this last mortgage, given by Brown alone to Mrs. Page, must also be paid, would be to tack onto the first mortgage by her to Featherstone the mort-

gage by Brown, given at a later day, and to which Emerson was not a party. Brandt, in his work on Suretyship and Guaranty, says: "The surety who pays a debt secured by mortgage will by means of subrogation thereto have preference over a subsequent mortgage on the same property, given by the principal to the creditor to secure a subsequent debt." 2 Brandt, Sur. § 315; *Bank v. Silliman*, 65 N. Y. 475. The debt which Emerson was compelled to pay was a prior one, and Featherstone must have known of Emerson's right to subrogation upon paying it when he purchased the subsequent \$800 note given by Brown alone. If a surety on any number of notes less than the whole number secured by a mortgage satisfies such as he is surety upon, he cannot, without paying all of the notes, be subrogated to the rights of the mortgagee or his assignee, because that would deprive the creditor of his security without payment of the debt. Such subrogation would be *pro tanto*. Emerson is not asking for subrogation upon payment of a part of the indebtedness which the mortgage was given to secure. He tenders the entire debt secured by it. The \$800 mortgage simply states that it is given for Brown's unpaid portion of the purchase money. There is no other agreement as to a purchase-money mortgage, and cases cited above hold that such statement cannot transfer to the assignee of a purchase-money mortgage the equitable lien in favor of the vendor; and certainly it cannot do so after such lien or equity has been abandoned by taking the second \$2,000 mortgage as in this case.

I will refer to some of the authorities principally relied upon, cited in the opinion of the court. 2 Warv. Vend. 736, and 2 Jones, Mortg. 1116, are cited. Those sections are confined to cases where there is an express agreement for a lien, or where the vendor has not parted with his legal title. They can have no application to this.

case. The same must be said of the sections referred to in Sheldon on Subrogation. Page 583, 19 Am. & Eng. Enc. Law, cited, contains one very broad statement. The author, however, refers in a note to the case of *Austin v. Underwood*, 37 Ill. 438. That was a case under the statutes of Illinois, which did not permit a homestead right to defeat the collection of the purchase money for the land. The case of *Flanagan v. Cushman*, 48 Tex. 241, is against the great weight of authority, and it further holds that the mortgage places the superior title to the land in the mortgagee. It appears that Featherstone obtained one-half of the land upon the foreclosure of the mortgage, for which he paid \$700. If Emerson has no equities under his cross complaint, his one-half will cost him, in principal, interest, attorney's fees, and costs, more than \$4,000.

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J. W. SCOTT AND WIFE, REPENDENTS, v. PROVO  
CITY, APPELLANT.

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TORT—CHARGE TO JURY—NEGLIGENCE—NOTICE TO OFFICERS—VER-  
DICT BY JURORS.

1. Where the court, in beginning the charge, states the material allegations of the complaint and the admissions and denials of the answer, it is not error if it afterwards refers to them in general terms, by stating that the plaintiff should establish each of the material allegations of the complaint by a preponderance of the evidence, without restating them.
2. Where a court charges a jury that it shall take into consideration whether the sidewalk was in a central position or in the outskirts, and the amount of travel over it, it is not



error if it at the same time charge the jury that it was the duty of the city to keep its streets and sidewalks over their entire length and breadth in good order and repair.

3. It is proper for a court to instruct the jurors that they might consider whether or not it was a common occurrence for a culvert to be out of repair, as it went to the question of notice to the officers of the city.
4. It is the duty of municipal officers having the oversight and care of streets and sidewalks to use all reasonable diligence to keep them reasonably safe for persons using them with reasonable care.
5. In civil cases nine jurors may find a verdict.

(No. 700. Decided August 3, 1895.)

Appeal from the district court of the First judicial district, Territory of Utah. Hon. W. H. King, *Judge*.

Action by J. W. Scott and wife against Provo City for damages sustained from a defective culvert in one of the ditches crossing defendant's sidewalk. Judgment for plaintiffs. Defendant appeals. *Affirmed*.

*A. D. Gash and Thurman & Wedgwood*, for appellant.

*J. W. N. Whitecotton and Williams, Van Cott & Sutherland*, for respondents.

ZANE, C. J.:

This action was brought to recover damages in consequence of an injury resulting, as alleged, from the negligence of the defendant. It appears from the evidence that the plaintiff, Elizabeth Scott, while walking in a dark night upon a sidewalk of a street of defendant, stepped into a hole in the cover of a culvert, and received very serious injury. There was a conflict in the evidence as to whether the hole was in that part of the sidewalk most usually traveled, or a little to one side.

It did not appear that any officer of the city upon whom the law imposed any duty with respect to the repair of sidewalks had actual knowledge of the defect, but the evidence was conflicting as to whether the covering of the culvert had been out of repair a sufficient length of time to authorize the inference that the officers of defendant would have known of it had they used reasonable diligence. It appears from the record that the jury resolved all questions upon conflicting evidence, as to essential facts, in favor of the plaintiffs, and returned a verdict for them in the sum of \$1,000.

Defendant's counsel allege: That the court erred in its charge to the jury.

First. In stating that the plaintiffs should establish each of the material allegations of the complaint by a preponderance of the evidence. That it should have stated those allegations, and should not have left the jurors to determine them for themselves. Statements, considered alone, often appear defective; when considered with others, appear sufficiently explicit. In commencing the charge, the court stated the material allegations of the complaint, and the admissions and denials of the answer. After that it was proper to refer to them in general terms.

Second. Appellant alleges that the court erred in charging the jury that it was the duty of the city to keep its streets and sidewalks over their entire length and breadth in good order and repair. This, when considered with other statements in the charge, informed the jury that it was the duty of defendant's officers to whom the law commits the oversight and care of streets to use all reasonable diligence to keep its streets and sidewalks in a reasonably safe condition for persons using them with reasonable care. The jurors were informed that, in determining whether the city was negligent in allowing

the culvert to remain out of repair, they should, with other facts mentioned, take into consideration whether the sidewalk was in a central position or in the outskirts, and the amount of travel over it.

Third. Appellant assigns as error the statement of the court to the jurors that they might consider whether or not it was a common occurrence for the culvert to be out of repair, and whether it had been frequently so since it was placed across the sidewalk. This evidence was offered as tending to prove notice,—evidence from which it might be inferred that the officers of the city did know of the defect, or that they should have known in the use of reasonable diligence.

Fourth. It is also alleged that the court erred in charging the jury that nine of them might find a verdict, and it is also alleged that the verdict was void, because it was not unanimous. This case was tried under the late territory of Utah, and this court, as well as the late supreme court of the territory, have decided the statute authorizing such a verdict valid, and we do not regard it as an open question in this court. We find no error in this record. The judgment appealed from is affirmed.

BARTCH and MINER, JJ., concur.

S. W. DARKE, ADMINISTRATOR, APPELLANT, v. WILLIAM L. SMITH, RESPONDENT.

EJECTMENT—DEMURRER—STATUTE OF FRAUDS—FINDINGS OF FACT—SPECIFIC PERFORMANCE.

1. Where plaintiff demurs and puts in an answer to a cross complaint, and it does not appear from the record that the court passed upon the demurrer, the error is not reversible.
2. The statute of frauds is not satisfied in a case of specific performance by a letter that has been lost, where its contents are testified to by the receiver, and the letter does not contain a description of the land in dispute with reasonable certainty.
3. "The appellate court will not disturb the verdict of a jury on the findings of any essential fact by the court, unless it can say that such finding or verdict is clearly against the weight of the evidence."
4. "When intention to execute the deed of gift is sufficiently proven, and possession is taken and held in pursuance of the promise by the promisee, and valuable improvements are made by the latter upon the faith of the transaction, courts of equity usually decree the specific performance of the promise."

(No. 696. Decided Aug. 11, 1896.)

Appeal from the district court of the Fourth judicial district, Territory of Utah. Hon. W. H. King, *Judge*.

Action of ejectment by S. W. Darke, administrator, against William L. Smith. Judgment for defendant. Plaintiff appeals. *Affirmed*.

*Maloney & Perkins*, and *S. W. Darke*, for appellant.

A parol gift of land by father to son will not be specifically enforced in equity, even though accompanied by possession. It will not be enforced against the father while living, nor against his heirs at law, after death. Nor in any case, nor as between persons, nor in favor of an assignee of such promises, however valuable a consideration may have been paid for such transfer. *Banks v. Mayo's Heirs*, 3 A. K. Marsh. 435; *Pinckard v. Pinckard*, 23 Ala. 649; *Harder v. Harder*, 2 Sand. Chy. 17; *Darlington v. Cole*, 1 Leigh. 36; *Black v. Cord*, 2 Har. & Gill. 100.

These cases show that the heirs at law are necessary parties defendant to defendant's cross complaint.

A parol gift is not only within the statute of frauds, but is purely *voluntary*, and equity will not enforce specific performance in favor of *volunteers*. *Banks v. Mayo's Heirs*, 3 A. K. Marshall 435; *Holland et ux v. Hensley et al.*, 4 Iowa 222-226. See authorities *post*.

The well settled rule is: "An agreement to be specifically enforced must not only be certain in its terms, and as to the subject matter, but that certainty must appear from the written contract, or letters, or from some writing therein referred to, so as to be understood without the aid of parol testimony." Willard's Equity 267; *Kendall v. Elmy et al.*, 2 Sum. 295; *St. Johns v. Benedict*, 6 Johns Ch'y 11; *Graham v. Call*, 5 Mumf. 569; *Dalzell v. Crawford*, Parson's Select Cases 37; *Parish v. Koons*, Id. 95-476; *Stoddard v. Tucker*, 5 Md. 18; *Shelton v. Church*, 18 Miss. 774; *Colson v. Thompson*, 2 Wheat. 336; 2 Leading Cases in Equity, 524; *Kay v. Curd*, 6 B. Monroe 100.

"Courts are unwilling to enforce parol contracts to convey land where indemnity in damages may be had." *McClure v. White*, 5 Minn. 139-140; Pom. Spe. Perf. sec. 103-104.

"If a *partly* performed parol contract relating to land can be specifically enforced, it must be proved to the

point of demonstration before specific performance will be decreed." *Barbour v. Barbour*, (N. J. Err. & App.) 28 Atl. 70; (Adv. parts) 51 N. J. Eq. (6 Dick.) 267; 29 Atl. 148.

"But relief demanded after a long lapse of time with no explanation of the delay, or after gross laches, will be denied." *Beers v. Hendrickson*, 6 Robt. 79; *Tufts v. Tufts*, 3 Wood & M. 508.

In *Henderson v. Hicks*, 58 Cal. 364, it was held that: "Specific performance is a relief which the court will not give unless in cases where the parties seeking it come as promptly as the nature of the case will permit." A delay of seven years is too long. Respondent is guilty of laches.

*Richards & Macmillan* and *Richards & Richards*, for respondent.

The uncertainty complained of is in the description of the land.

In *Tallman v. Franklin*, 14 N. Y. 584, in which the letter referred to is set out in full, the court held: Although the memorandum must contain what is necessary to show what the contract between the parties is, the property mentioned in it may be ascertained and located by extrinsic evidence, especially where the memorandum refers to such extrinsic evidence." And it is stated by the court in reversing the decision of the lower court that the intention of the statute is not to in any way vary the rules of evidence with reference to the introduction of parol testimony to vary the terms of the written contract, and if any property is referred to in the letter, which can be identified by parol testimony, it may be done. This is the general rule. *Easton v. Thatcher*, 7 Utah 99; *Browne on Statutes of Frauds*, 385; *Hollis v. Burges*, 37 Kas. 487.

The memorandum referred to the lands owned by the deceased in Weber, and parol testimony was introduced to show that the lands referred to were the lands in controversy. There can be no question about the admissibility and competency of this evidence. Evidence was admissible to show that deceased owned lands in Weber, and evidence was also admissible to show that he owned no other lands in Weber.

In *Easton v. Thatcher*, 7 Utah 99, the description was much more general. *Waring v. Ayres*, 40 N. Y. 358; note to *Atwood v. Cobb*, 26 Am. Dec. 669.

ZANE, C. J.:

The plaintiff, as administrator of the estate of the late Lot Smith, commenced an action of ejectment against the defendant in the district court on the 20th day of September, 1893, to recover 80 acres of land described in the complaint, to which the defendant filed an answer, in which he denied the plaintiff's allegations of ownership, right of possession, and damages, and set up the statute of limitations. The answer was accompanied with a cross complaint, in which the defendant alleged that he was the son of the intestate; that in May, 1884, his father gave him 80 acres of land, and then told him that he would deed it to him, and that he afterwards repeated the promise; that afterwards, in the same month, defendant, relying upon the promise, upon the request and with the knowledge of the deceased, went upon the land, and from thence hitherto has continued to cultivate it; that defendant has expended large sums of money in making valuable improvements thereon; that the improvements consisted of buildings, fences and ditches; and that he has paid all taxes levied upon the same; and, finally, the defendant prayed that plaintiff might be required to specifically perform the promise by

executing to him a sufficient deed to the lands. To defendant's cross complaint, the plaintiff filed a demurrer; but it does not appear from the record before us that this demurrer was ever decided by the court, or that it was ever brought to the court's attention. It does appear that the plaintiff answered, denying the material allegations of the cross complaint. Under these circumstances, we must hold that the failure of the court to rule upon plaintiff's demurrer is not reversible error. *Calderwood v. Tevis*, 23 Cal. 336.

The case was tried upon the issues made by the denials of the allegations of the cross complaint, and the court found the issues for the defendant, overruled the plaintiff's motion for a new trial, and entered, in effect, a decree of specific performance of the alleged agreement to give the 80 acres of land to the defendant. From the judgment of the court denying his motion for a new trial, and the decree of specific performance, the plaintiff has appealed to this court. He alleges that the court erred in finding from the evidence that the late Lot Smith, in 1884, or at any other time, agreed to deed the land in dispute to the defendant, and in finding that the defendant, relying upon such agreement, took possession of it, and made valuable improvements thereon, as alleged in the complaint.

The defendant testified that in April, 1884, he received a letter from his father, who was then in Arizona, and afterwards lost it in moving. Jane L. Smith testified that she read the letter; that it was Lot Smith's writing; that her son let her read it; that intestate stated in it that he wanted the defendant to take possession of the land, and make him a home, and he would give him a deed to it; that the letter mentioned the land. It referred to the land he owned in Weber. He owned other land there. Two other witnesses corroborate the defendant and Jane

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L. Smith in some material respects. While the letter, as remembered by the witness, does not contain a description of the land in dispute, or refer to it with reasonable certainty, the testimony of the witnesses, taken in connection with the letter, indicates that the land in dispute was intended. We think that this letter was not sufficiently definite and certain as a writing to take the transaction out of the statute of frauds. We are of the opinion, however, that it was the duty of the court to consider the letter with the oral evidence, and to determine from both whether a parol promise to give the land to defendant was sufficiently expressed; and that it was also the duty of the court to ascertain from the evidence whether possession had been taken and held by the defendant, under the agreement to give, if proven, and whether valuable improvements had been made thereon by the defendant, and their values. The evidence on the trial was very conflicting as to the intestate's declarations with respect to his intention to give the land to his son, and also as to the claims made by the defendant to it, and to the improvements made upon it by him, and the value thereof. It must be conceded that the proof was not as clear and satisfactory as desired, but there was considerable evidence on both sides, so much that fair-minded and reasonable men might reach different conclusions as to the facts found by the court; and, that being so, we are not disposed to hold that the court erred in making the findings complained of.

The appellate court will not disturb a verdict of a jury or the finding of any essential fact by the court unless it can say without hesitation that such finding or verdict is clearly against the weight of the evidence. *Hannaman v. Karriek*, 9 Utah 237, 33 Pac. 1039; *People v. Manning*, 48 Cal. 335.

In this we do not wish to be understood as holding

that the court can find facts upon conjectures or uncertainties. The findings must be upon a clear preponderance of the evidence. The intention to give and to execute the conveyance must be clearly established by competent and reliable evidence. The rule undoubtedly is that a court of equity will not decree the specific performance of a promise to give, or a voluntary contract alone, even when such a promise or contract is based upon a good consideration, such as blood or natural affection between near relatives, or the like; but when the intention to execute the deed of gift is sufficiently proven, and possession is taken and held in pursuance of the promise by the promisee, and valuable improvements are made by the latter upon the faith of the transaction, courts of equity usually decree the specific performance of the promise. Of course, this will not be done unless the transaction appears to be fair and equitable. *Burlingame v. Rowland*, 77 Cal. 315, 19 Pac. 526; *Freeman v. Freeman*, 43 N. Y. 34; *Lobdell v. Lobdell*, 36 N. Y. 327.

We have examined the other errors assigned, but we do not deem it necessary to extend this opinion by a special consideration of them. We are of the opinion that they are not well founded. The findings and decree of the court below are affirmed.

BARTCH, J., and STREET, District Judge, concur.

BRIGHTON AND NORTH POINT IRRIGATION  
COMPANY, APPELLANT, v. CHARLES C. LITTLE  
AND OTHERS, RESPONDENTS.

IRRIGATION—CONTRACTS—CONSTRUCTION—PLEADING—CROSS COM-  
PLAINT.

1. The Jordan Irrigation Company entered into a contract with one Little whereby the latter transferred his title to a certain dam and canal, and granted a right of way through his land for said canal, to the irrigation company, in consideration that it would permit Little to water from the canal, which the company enlarged, 200 acres of his land. The plaintiff herein became the legal successor of the irrigation company, and defendants became successors to Little. Defendants took the water from the canal at six different places, but not subject to the direction and control of the water master. *Held*, that, assuming the land to be undulating, said defendants might take the water from the canal in said number of different places, if convenience and necessity so required, and that defendants were not subject, like stockholders, to the control of the water master, but should follow the directions of the water master, as far as they may be according to the agreement.
2. As it did not appear by the weight of evidence that Little agreed to contribute proportionately with the stockholders in keeping the canal cleaned and in repair, his successors were not bound to do so.
3. Where, in the prayer of the complaint, the plaintiff asks that the defendants might be required to set forth their alleged adverse claim, and that the court might decree it to be null and void, and the defendants set up the agreement, and the facts upon which they base their rights to the water, and pray that their rights as shown by the allegation in their answer may be decreed to them, the court may grant to defendants an affirmative decree without a cross complaint having been filed.

(No. 635. Decided Aug. 20, 1896.)

Appeal from the district court of the Third judicial district. Hon. S. A. Merritt, *Judge*.

This was an action by the Brighton and North Point Irrigation Company against Charles C. Little and others to establish the right and control of the waters of a certain canal, and to quiet title against defendants, and asking that they be required to set forth their rights. From a judgment for defendants, plaintiff appeals. *Affirmed*.

*Brown, Henderson & King*, for appellant.

The defendants did not file any cross complaint. They had neglected to be plaintiffs in any action; seemed unwilling to have this matter settled by a competent decree, and when sued failed to file any cross complaint whatsoever. We allege it as error for the court to award an affirmative decree in their behalf. If the plaintiff failed to make out a case, the most that could be done would be to dismiss his complaint.

If a defendant has any cause of cross complaint he should plead it as such.

Matters which are proper as a defense will not be turned into a counter claim or cross complaint merely by a prayer for affirmative relief. *Shain v. Bebin*, 79 Cal. 263; *Doyle v. Franklin*, 40 Cal. 110; *Brannan v. Paty*, 58 Cal. 331-333; *Carpenter v. Hewelle*, 7 Cal. 590.

*Williams, Van Cott & Sutherland*, for respondent.

ZANE, C. J.:

It appears from the evidence in this record that in the year 1860 the late Feramor Little owned a canal through which he was irrigating about 200 acres of land from the Jordan river; that the canal was four miles long, two of

which were on his land; that it was six feet wide at the bottom, and wider at the top, and was more than a foot deep. It also appears that certain owners of land situated below Little's farm organized a corporation known as the Jordan Irrigation Company; that in 1864 Little transferred to it his dam and canal, and the right of way through his land for the distance of over two miles, in consideration that the company would permit him to take as much water as he was using for the irrigation of the 200 acres. The company was also given the right to remove a house of his to enable the company to straighten the canal, for which he was to be paid \$1,000. It appears further that the company took possession of the canal and dam, and that said company and the plaintiff, its successor, have since enlarged it, and hitherto have kept it in repair, and that \$200 has been paid on the \$1,000. It also appears that the North Point Irrigation Company, the plaintiff, was organized in 1882, and succeeded to the rights and obligations of the Jordan Irrigation Company, as far as they relate to the canal in question. After hearing the evidence and arguments of counsel for the respective parties, the court below made a number of findings among which were the following: "(7) That the said defendants herein have succeeded \* \* \* to the said land owned by Feramorz Little, and own the same in fee simple, and also have succeeded to, and that they now \* \* \* own, all of said Feramorz Little's rights in and to the water owned by the said Feramorz Little, and have succeeded to all of his rights in and to said dam, ditch, and water right. (8) That said defendants and their predecessor in interest, to wit, the said Feramorz Little, have for a long time passed used, and are now using, for useful purposes of the water of said canal and ditch, and are entitled to such use, as a reasonable necessity for said Little farm from said canal

and ditch, a quantity of water, continuously flowing, equal to a stream thirty-six inches wide by six inches deep, flowing through a wooden box set level, and not less than four feet long; and the water may be taken out at six different places along where the canal passes through the Little farm. (9) That said defendants are entitled to said quantity of water described in said finding 8, for the use of said Little farm, without any expense to themselves whatever, except that the said defendants are to take the water from said canal where it passes through the said Little farm." The evidence was conflicting as to the quantity of water necessary to irrigate defendants' 200 acres of land. Competent experts, as well as farmers of observation and experience with respect to irrigation, were examined, and the findings as to the quantity appears to be supported by the weight of evidence.

Objection is also made to the finding that defendants have the right to take the water out at six different places. Assuming that the land is undulating, the irrigation of it is less difficult and less expensive when the water is taken out of the canal at different points. It appears that the water has been taken from the canal at as many as six places.

It is insisted that the defendants should be required to take water under the direction of the water master, as the stockholders of the plaintiff are required to do. The court below held that the defendants had a right to take water under the agreement made between the late Fera-morz Little and the Jordan Irrigation Company, and not as stockholders. In this we think the court found correctly, but, while this is so, the defendants should follow the directions of the water master, so far as they may be, according to the agreement, reasonable; and they should not take out water at more points than conve-

nience and necessity require, and they should use all reasonable care not to injure its banks, or interfere unreasonably with its waters.

The plaintiff also insists that the defendants should contribute proportionately with the stockholders to the cost of cleaning out and keeping the canal in repair. The court below found that the agreement by which all the parties were bound exempts the defendants from the payment of such costs and expense, and this finding seems to be supported by the weight of evidence.

The plaintiff also insists that the court erred in granting an affirmative decree for the defendants, without a cross complaint having been filed. In the prayer of the complaint the plaintiff asked that the defendants might be required to set forth their alleged adverse claim, and that the court might decree it to be null and void. And the defendants in their answer set up the agreement, and the facts upon which they based their right to use the waters of the canal, and prayed that their right, as shown by the allegations of their answer, might be decreed to them, and for such other relief as might be just and equitable. Under the pleadings, the court was required to determine from the evidence the rights of the respective parties with respect to the canal and the waters thereof. The pleading in this case presents an exception to the general rule that affirmative relief on an affirmative decree will not be granted to the defendants without a counter claim or a cross complaint. *Kitts v. Austin*, 83 Cal. 167, 23 Pac. 290; *Wilson v. Madison*, 55 Cal. 5; *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195.

We find no reversible error in this record. The judgment is affirmed

BARTCH and MINER, JJ., concur.

JAMES MCGREGOR, RESPONDENT, v. SILVER KING  
MINING COMPANY, APPELLANT.

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ENJOINING TRESPASS—PLEADING—REMEDY AT LAW—EASEMENT—  
TITLE IN DISPUTE.

1. The foundation of the jurisdiction in a court of equity to issue an injunction in aid of a trespass is the probability of irreparable injury, the inadequacy of pecuniary compensation, or the prevention of a multiplicity of suits.
2. It is not enough that the injury complained of is merely nominal, theoretical, or is apprehended, even though an action at law might be maintained; but, to justify the interposition of this summary power of injunction of a court of equity, there must be a cause to fear substantial, serious, and irreparable damage, for which courts of law would furnish no adequate relief, and the complaint should show facts to justify this conclusion.
3. Courts of equity will not ordinarily exercise this summary and extraordinary power when substantial justice can be done by courts of law, or by such other means as the court may exercise in order to prevent injustice during the interval preceding a final hearing on its merits.
4. The mere construction of a ditch across barren, rocky, uncultivated, and comparatively valueless land is not, of itself, an irreparable injury.
5. Injunctions are not usually granted to restrain a trespass, merely because it is such, without showing the property trespassed upon has some peculiar value that could not admit of due recompense, or that it would be destroyed by repeated or continuous acts of trespass.
6. An easement or servitude in land can only be acquired by the consent or acquiescence of the owner.
7. The digging of a trench and pipe line across plaintiff's lots, which are alleged to be barren, rocky, vacant and comparatively valueless, and when no great appreciable damage will



be done by acts threatened to be continued, and it appears that the defendant is solvent and able to respond in damages, and it also appears that the title of the plaintiff in the property is in dispute, because of condemnation proceedings begun under the statutes, is not such an irreparable injury as to justify the extraordinary remedy by injunction, when taken in connection with the facts in the case. Ordinarily, this remedy by temporary restraining order will not be exercised when the right of the plaintiff is doubtful, and has not been settled by law, or where the remedy at law is adequate, or the title in question is in dispute.

8. Where, in such a case, it appears that the continuance of a temporary restraining order, to the hearing, may work great injury to one of the parties, without corresponding benefit to the other, the restraining order should be set aside.

(No. 620. Decided Aug. 27, 1896.)

Appeal from the district court of the Third judicial district, Territory of Utah. Hon. W. H. King, *Judge*.

Action by James McGregor against the Silver King Mining Company. From an order granting a temporary injunction, defendant appeals. *Reversed*.

Defendant undertook to dig a trench across plaintiff's mining lands, and justified his acts under condemnation proceedings by authority of the statute approved March 10, 1892.

*Dickson, Ellis & Ellis*, for appellant.

On the question of plaintiff's proper remedy appellant cited: *Thorn v. Sweeney*, 12 Nev. 256; High on Injunctions, sec. 13, and cases cited in note 1; *Swift v. Jenks*, 19 Fed. R. 643; *Jerome v. Ross*, 7th John. Ch. side pp. 334-337.

*Moyle, Zane & Costigan* and *Marshall & Rayle*, for respondent.

There can be no question upon our right to an injunction, unless their condemnation proceedings are good. *Richards v. Dower*, 64 Cal. 62; *Robertson v. Smith*, 7 Mining Rep. 196; *Mott v. Ewing*, 90 Cal. 231; *Moore v. Waterworks Co.*, 68 Cal. 146; *Moore v. Massini*, 32 Cal. 595; 1 High on Injunc., sec. 702; 3 Pomeroy Eq. Jurisp., sec. 1357.

The foregoing authorities show that such a trespass is always an irreparable injury, and good cause for injunction. The case of *Thorn v. Succney*, cited by defendant, is irreconcilable with the settled law on the subject.

An injunction also lies on account of the force and violence. *Cœur D'Alene Co. v. Miners' Union*, 51 Fed. Rep. 260; *Ann Arbor R. R. Cases*, 54 Fed. Rep. 40, 746, 994.

The alleged defence of condemnation proceedings raises a question which is of first impression, and of the highest importance. But it is not necessary to decide any constitutional question in this case, because the act of 1892 does not apply to condemnation proceedings by mining companies. That procedure is regulated by the act, Laws of 1890, p. 38. All the authorities are opposed to the doctrine of implied repeals, except when absolutely necessary, and the act of 1890 being a specific act, was not repealed by general words in the act of 1892. *Endlich Interp. Stat.* § 223, *et seq.*

Hence the defendant has mistaken his remedy, if the law gave him one, and his defence must fail.

PER CURIAM:

The plaintiff in this case alleges that he is the owner of certain mining claims named in the complaint; that on the 16th day of October, 1895, the defendant company entered, with a large force of men, upon the mining claims of plaintiff, dug a trench thereon for the purpose

of laying a pipe line in said trench across the surface of said claims, and threatened to maintain the same, which trespass, plaintiff claims, will ripen into an easement, cause a cloud upon plaintiff's title, and a multiplicity of suits, unless enjoined; and asks a restraining order and judgment. The defendant files its answer, admitting that it entered upon the claims as aforesaid, and dug the trench and laid the pipe line across the surface of said claims, which were rocky, barren, and of no value whatever, for the purpose of maintaining the same across said land of the plaintiff; denies the damage, trespass, force, irreparable injury, and easement alleged; denies its intention to construct said pipe line across said land of the plaintiff, which lies between the defendant's water supply, in Thayne's mine and tunnel, and its mining works below, except by virtue of condemnation proceedings begun and concluded under section 2788, Comp. Laws Utah 1888, as amended, wherein damages were awarded and tendered the plaintiff, which damages he refused to accept; and alleges that it had a right to construct said pipe line, in order to carry water, which was necessary to operate its said mine, from Thayne's tunnel and mining claim, which it owned, to the defendant's mine; that said water supply was the only source of supply for water to its mine, and the same could not be operated without said water; that at, before, and since the time in question, it had owned, operated, and developed the Silver King Mines, and was then engaged in working, operating, and extracting ores therefrom, and employed over 150 men for that purpose; that defendant is, and for many months last past has been, desirous of conducting said water by means of a pipe line from said source to its said Silver King mines; that owing to the topography of the country between said Thayne mining claim, and the tunnel

thereon, and the said Silver King mines, it is not practicable to construct a pipe line for the carrying of said water from said Thayne tunnel to said Silver King Mines without crossing the said mining claims of the said plaintiff; that the surface, and the whole of the surface, of said mining claims of the said plaintiff is rocky and barren, and that a trench or a pipe line across said lands would not result in any damage to said plaintiff; that the defendant, being unable to obtain the consent of said plaintiff to construct said trench and pipe line over and across said lands of said plaintiff by offering to pay full compensation to said plaintiff for said right of way for such trench and pipe line over said lands of said plaintiff, and for all injury that might be done thereto, proceeded, under the provisions of an act of the legislature aforesaid, to construct the same; that the plaintiff will suffer no irreparable or other damage by the running of said pipe line; that the defendant is solvent, and able to pay any sum plaintiff may recover as damages; and that the plaintiff has a remedy at law. Upon the hearing the court granted an interlocutory injunction enjoining the defendant from digging of said trench, and from laying a pipe line therein, and from continuing to maintain any trench or pipe line upon said McGregor consolidated group of mines. From this order this appeal is taken.

Defendant assigns as error the making of said order, and that the proofs do not establish facts which constitute any ground of equitable relief, and because all the equities of the bill were denied in the answer, and a complete defense affirmatively interposed under the statutes of Utah in relation to eminent domain. The plaintiff takes issue upon this contention, and claims that section 2788, Comp. Laws Utah 1888, as amended, under which the condemnation proceedings were had, is uncon-

stitutional, and the condemnation sought was not for public use, and was not necessary. In this somewhat collateral proceeding, we are not disposed to discuss the constitutional question here presented, as the result must depend upon other questions. The foundation of the jurisdiction of a court of equity to issue injunctions to restrain trespasses is the probability of irreparable injury, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits, where the rights of numerous persons are involved. It is not sufficient that the complaint alleges that the injury would be irreparable, when that is the ground of equitable relief. But the plaintiff, in addition thereto, should affirmatively show by its complaint why it would be so, or allege facts which will justify that reasonable conclusion; otherwise the extraordinary remedy by injunction should not be allowed. The allegation in the complaint that the defendant may or will acquire an easement in the land proposed to be covered by the pipe line, under the circumstances in this case, is sufficiently answered by the fact that no such easement or servitude could be acquired, except by consent or acquiescence of the plaintiff, and in any event forms no basis for injunctive relief pending the final hearing. Washb. Easem. (4th Ed.) §§ 86, 110, 111; *Thorn v. Sweeney*, 12 Nev. 251. And the digging of a trench and pipe line across plaintiff's lots, which are alleged to be rocky, barren, vacant, and comparatively valueless, is not such an irreparable injury as to justify this extraordinary remedy by injunction, when taken in connection with all the other facts in the case. Ordinarily, this remedy by injunction will not be exercised when the right of the complainant is doubtful, and has not been settled at law. Even when it has been settled an injunction will not be granted when the remedy at law is adequate. *Waldron v. Marsh*, 5 Cal. 120; *Real*

*Del Monte Consol. Gold & Silver Min. Co. v. Pond Gold & Silver Min. Co.*, 23 Cal. 83; *Thorn v. Sweeney*, 12 Nev. 251.

But when the title is not disputed, or has been settled by an action at law, and the plaintiff is shown to be liable to irreparable injury by continued acts of trespass, or such acts will result in the destruction of his property, then the fact that the defendant is willing and able to pay for the damage is immaterial, for in such a case there is no means of determining whether the value would compensate the plaintiff for its destruction. While this is so in such cases, yet if no appreciable injury will arise by the acts done or threatened to be continued, it does not follow that the same rule prevails, as a matter of course, in cases where the title or right is in dispute. Injunctions are not usually granted to restrain a trespass, merely because it is such, without showing the property itself trespassed upon has some peculiar value that could not admit of due recompense, or that it would be destroyed by repeated or continuous acts of trespass.

This alleged threatened continuation of the trespass by continuing the pipe line over the plaintiff's land is therefore the principal ground upon which the injunction may have been granted. All the allegations in the complaint are denied, so far as they are material, except the ownership of the claims in question, and the trespass alleged is attempted to be justified upon proceedings taken under the statute for condemnation. The title or right of the defendant to lay its pipe line is therefore in dispute. The damages, if any, in laying the pipe line, are not shown to be more than merely nominal. The defendant is shown to be operating a mine, with 150 men employed. The land over which the pipe line would run is alleged to be rocky and barren, and is not shown to be

of any particular value. Whether or not the plaintiff will suffer any material damage at all is in dispute. It is not disputed that the defendant is solvent, and able to pay any damages recovered. The defendant alleges that it has no other source of supply of water to its mine and works than that flowing from the Thayne tunnel and lake. Damages awarded by the commissioners for the taking of such land under the statute have been found, and tendered to the plaintiff, and such tender refused. "It is not enough that the injury complained of is merely nominal, theoretical, or is apprehended, even though an action at law might be maintained; but, to justify the interposition of this summary power of a court of equity, there must be a cause to fear substantial and serious damage, for which courts of law could furnish no adequate remedy." If the granting of an injunction would necessarily cause a great loss to the defendant pending the hearing on the merits,—a loss altogether disproportionate to the injury sustained by the plaintiff, that fact should be considered, in determining whether the application should be granted, and in some cases would justly have great weight. Courts of equity will not ordinarily exercise this summary and extraordinary power when substantial justice can be done by courts of law, or by such other means as the court may exercise in order to prevent injustice during the interval preceding a final hearing on the merits. *Thorn v. Suecney*, 12 Nev. 251; 42 Eng. Ch. 165; *Bassett v. Manufacturing Co.*, 47 N. H. 437; *Bigelow v. Bridge Co.*, 14 Conn. 565; *Wason v. Sanborn*, 45 N. H. 170; High Inj. §§ 459-483; 2 Story Eq. Jur. 925; *Jerome v. Ross*, 7 Johns. Ch. 334.

In *Bassett v. Manufacturing Co.*, 47 N. H. 437, the court says: "The power to grant injunctions to prevent injustice has always been regarded as peculiar and extraordinary. It is not controlled by ordinary and techni-

cal rules, but the application for its exercise is addressed to the conscience and sound discretion of the court. Ordinarily, it will not be exercised when the right of the complainant is doubtful, and has not been settled at law; and, even when it has been so settled, an injunction will not be granted when the remedy at law is adequate. It is not enough that an injury merely nominal or theoretical is apprehended, even although an action at law might be maintained for it; but, to justify the interposition of this summary power, there must be cause to fear substantial and serious damage, for which courts of law could furnish no adequate remedy. When injuries shall be regarded as irreparable at law must depend upon the circumstances of the particular case. If the injury be trivial, as by \* \* \* raising the water of a river a few inches upon its rocky shore, doing him no appreciable or serious damage, equity would not ordinarily interfere by injunction, even in cases where the right has been established at law; for the power is extraordinary in its character, and is to be exercised, in general, only in places of necessity, and when the court can see that other remedies are inadequate to do justice between the parties, and even then it is to be exercised with great care and discretion. If the granting of an injunction would necessarily cause great loss to the defendant,—a loss altogether disproportionate to the injuries sustained by the plaintiff,—that fact should be considered, in determining whether the application should be granted, and in some cases it would justly have great weight. It has often been supposed that when the right has been established at law the plaintiff would be entitled to an injunction as a matter of course; and this misapprehension has arisen, probably, from the fact that, in a large number of cases, injunctions have been refused upon the express ground that the title of the plaintiff had not been estab-



lished at law, leaving room for inference that if it had been so established the injunction would have been issued. This, however, is clearly not the doctrine of courts of equity, for they will not ordinarily exercise this summary and extraordinary power when substantial justice can be done by courts of law." The doctrine announced in this case is fully supported by the following authorities; *Bigelow v. Bridge Co.*, 14 Conn. 565; *Wason v. Sanborn*, 45 N. H. 170; *Blake v. City of Brooklyn*, 26 Barb. 301; *Murray v. Knapp*, 42 How. Prac. 462; 62 Barb. 566; *Nicodemus v. Nicodemus*, 41 Md. 537; *Weigel v. Walsh*, 45 Mo. 560; *Bechtel v. Carslake*, 11 N. J. Eq. 244; *Catching v. Terrell*, 10 Ga. 578; *Wooding v. Malone*, 30 Ga. 980; 1 High, Inj. §§ 459, 483; *Eden, Inj.* 231; 2 Story, Eq. Jur. 925, 928; *Thorn v. Sweeney*, 18 Nev. 251.

It appears to us that to continue the restraining order until the hearing may work great injury to one of the parties, without corresponding benefit to the other, and that the plaintiff has his remedy in damages. If it is finally decided that the law is constitutional, and the proceedings regular, then the plaintiff will be bound by the decree made by the arbitrators; otherwise he will be entitled to recover damages for whatever injury he has sustained by reason of the acts complained of. The restraining order appealed from, granting the injunction *pendente lite*, is set aside and reversed.

MINER, J., and RITCHIE and STREET, District Judges,  
concur.

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## CRESCENT MINING COMPANY, RESPONDENT, v. SILVER KING MINING COMPANY, APPELLANT.

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c17 460TEMPORARY INJUNCTION—CONFLICTING AND INDEFINITE ALLEGATIONS AND PROOF—CONTINUING RESTRAINING ORDER  
UNTIL HEARING.

1. Where the pleadings and affidavits on hearing for a temporary restraining order are such as to leave in doubt the quantity of water appropriated by or belonging to each party, and it does not appear with reasonable certainty that defendant had not acquired or did not own the water and mines referred to in the complaint, and no definite or certain amount of water is alleged to belong to the plaintiff, and it also appears that the allegations in the complaint and affidavit supporting it are substantially denied, and it is alleged that license was granted defendant to lay a pipe line over the land of plaintiff to the water in question, which is denied, and when the restraining order leaves in uncertainty the amount of water defendant was permitted to use, *held*, that the respective rights of each party are so uncertain and indefinite that the same cannot be safely determined from the conflicting affidavits and showing made.
2. When this state of facts exists, and it is apparent that the continuance of the restraining order until the hearing will work great injury to one of the parties, without corresponding benefit to the other, *held*, that the restraining order should not continue, if adequate protection to the parties until the final hearing can be had without it, by means of a bond of indemnity.
3. *Held*, also, that under the facts in this case a proper determination of the case can only be reached upon a trial, where the witnesses can be heard and examined in a way to sift their candor, recollection, and truthfulness.

STREET, District Judge, dissenting.

(No. 680. Decided Sept. 4, 1896.)

Appeal from the district court of the Third judicial circuit, Territory of Utah, Hon. W. H. King, *Judge*.

Action by the Crescent Mining Company against the Silver King Mining Company for trespass, and to require defendant to show cause why an injunction should not be granted pending the final hearing in the action, and to temporarily restrain defendant from the acts complained of, until the hearing upon the order to show cause.

From an order granting a temporary injunction, defendant appeals. *Reversed*.

*Dickson, Ellis & Ellis*, for appellant.

The opinion in the case of William B. Smith et al. v. Jonah Philips, 6 Utah 376, does not disclose just what the pleadings in that case contained, but we have a right to assume that they warranted the decree which was entered below, and reversed on appeal.

There the decree was—"That the defendant shall have the use of *one good irrigation stream of water* of said Dry Creek \* \* \* to be measured out, distributed to him and his use thereof regulated by the water master."

The court held that this decree was absolutely fatally defective for uncertainty.

In this case the order appealed from is, that defendant—"Be enjoined and restrained from taking or diverting from the said Thayne's or Shadow Lake mentioned and described in the complaint herein, by its pipe line or otherwise, or from any of the visible sources of supply or tributaries of the said lake including the stream of water issuing from the Jeannette or Thayne's tunnel described in the complaint herein, any water or waters therein \* \* \* *except* that the said defendant *during the irrigating season of each year* is allowed and permitted to take from the waters of said Shadow Lake *an amount*

*of water equal to the amount heretofore used by the grantors of said defendant, and reasonably necessary for irrigating certain lands formerly owned by one Sullivan and his grantors, described in the proofs in this action."*

Surely the same certainty is as necessary in an injunction order as in a judgment.

The allegation here is not that defendant is guilty of a continuing trespass, in the matter of digging a trench and laying a pipe therein, and there is not one single element of irreparable injury—no showing of waste or destruction.

If digging this trench is actionable, it is a mere naked trespass, to restrain which no injunction can be sustained. High on Injunctions, sec. 697-699 and cases there cited.

"The appropriate function of the writ of injunction is to afford preventive relief only, and not to correct injuries which have already been committed, or to restore parties to rights of which they have already been deprived.

"It is not, therefore, an appropriate remedy to procure relief for *past injuries*, and it is only to be used for the prevention of a future injury actually threatened, and to prevent the perpetration of a legal wrong for which no adequate remedy can be had in damages. And if the act sought to be enjoined has already been committed, equity will not interfere, since the granting of an injunction under such circumstances would be a useless act." High on Injunctions, 1st vol., sec. 23.

As to the matter of defendant acquiring an easement in plaintiff's land by these trenches and pipe line, that needs no discussion. An easement in land can only be acquired by consent or acquiescence, and the bringing of this suit is enough to stop the running of the statute or the acquiring of any right by prescription.

Where it appears that greater danger is likely to

result from granting than from withholding the relief, or where the inconvenience seems to be equally divided as between the parties, the injunction will be refused, and the parties left as they are, until the legal right can be determined at law.

This is especially true when the injuries which would result to defendant if the relief were improperly granted would greatly exceed the benefits which might result to plaintiff if the injunction were improperly granted.

High on Injunctions, section 13 and cases cited in note 1; *Swift v. Jenks et al.*, 19 Fed. R. 643.

In this case it is said: "Where an injunction will work great injury to one party without corresponding benefit to the other, it should not ordinarily issue, especially where adequate protection can be had without it." And see *McHenry v. Jewett*, 90 N. Y. 62.

*Moyle, Zane & Costigan* and *Marshall & Royle*, for respondent.

An injunction always lies to prevent a threatened interference with water rights.

Among the many cases we cite 8 Cal. 78, 392; and in the Utah supreme court *Nephi Co. v. Jenkins*, 8 Utah 369; *Paragoonah Co. v. Edwards*, 9 Utah 477.

The right to an injunction to prevent the pipe line and the affecting of a permanent lodgment in our ground, the creation of an easement and a cloud upon our title, is also plain. *Richards v. Dower*, 64 Cal. 62; *Robertson v. Smith*, 7 Mining Rep. 196; High on Injunctions sec. 702; 3 Pomeroy Eq. Jurisp. sec. 1359.

This jurisdiction is well settled. *Moore v. Waterworks Co.*, 68 Cal. 146; *Mott v. Ewing*, 90 Cal. 231.

Such damage is always irreparable. *Richards v. Dower*, 64 Cal. 62; *Lighter Co. v. Simpson*, 77 Cal. 290; *Moore v. Massini*, 32 Cal. 595.

Besides, an injunction lies on account of the superior force and the lawlessness and violence. *Cœur D'Alene Co v. Miners' Union*, 51 Fed. Rep. 260; Ann Arbor R. R. cases, 54 Fed. Rep. 40, 746, 994.

The case of *Thorn v. Sweeney*, 12 Nev. 251, is wholly opposed to the current of authority, and is absolutely irreconcilable to the other cases quoted. The immortal Sweeney appears in many places in the Nevada Reports, now in water litigation, now in prison for contempt, but although apparently unsuccessful in his litigation he caused the Nevada court in this case to lay down some exceedingly poor law.

Here the legal right was admittedly clear. Our ownership was not disputed; the license claimed to have been given by McGregor, even if given, which the evidence shows is not true, was something which he had no authority to give, 4 Thompson on Corporations, section 4848; the property rights in the water and our appropriation are admitted; the claim of loss to the Silver King Company has already been shown to be absolutely without foundation.

The claim that they were going to condemn is shown to be disingenuous and untrue, because no such proceedings have ever been attempted. If attempted they would have been illegal, as our brief in the case of *McGregor v. Silver King* fully shows.

Finally, the claim is made that the injunctive order is indefinite. We call the court's attention to the fact that Sullivan's deed to the Silver King Company for agricultural water is dated long after the bringing of this suit, and is clearly a mere subterfuge for the defendant, or perhaps it had better be called *tabula in nuafragio*. But the order is not indefinite. The quantity of water necessary for Sullivan's land can be easily

ascertained, and our supreme court has so decided. *Holman v. Pleasant Grove*, 8 Utah 78:

MINER, J.:

This action was commenced July 18, 1895, in which the plaintiff prays that the defendant and its officers and agents be restrained from diverting or taking from Thayne's or Shadow lake, by its pipe line or otherwise, or from any of its visible sources of supply or tributaries of said lake, including the said stream issuing from the said Jeannette tunnel, any water or waters therein, or from taking any water from the said plaintiff's pipe line against its will, and from entering upon the Ætna, Hecla, Rebellion, Climax, Garfield, Senate, Walker, Extension, Spring, and Pinto mines, and from bringing any force of men upon said mining claims, and from using or attempting to use said pipe line upon said mining claims, and for an order to show cause, and for temporary injunction and judgment. Afterwards, on motion of defendant, and upon a hearing, the restraining order was set aside, upon defendant filing a bond, in the sum of \$25,000, conditioned to pay all damages that might arise to the plaintiff for the acts complained of. And it was further ordered that the parties maintain the same status existing at the commencement of the suit. The bond ordered was given. The cause came on for hearing upon the order to show cause why the temporary restraining order should not be granted pending a final hearing, and the court granted the restraining order as prayed for, except that the order allowed the defendant, during the irrigating season, to take from the waters of Shadow lake an amount of water equal to the amount heretofore used by the grantors of the defendant, and reasonably necessary for irrigating certain lands formerly owned by Sullivan and his grantors, described in the proofs, and that in case

of an appeal from the order the defendant should give a supersedeas bond, in the sum of \$25,000, suspending said injunction order during the pendency of the suit. From this order this appeal is taken.

Upon the hearing, numerous *ex parte* affidavits were filed, tending to sustain the allegations in the complaint and the denials and allegations in the answer. It also appears from the affidavit of one Thomas W. Ferry that prior to 1886 he and others owned the Thayne and Jeannette patented mining claims, and the Jeannette tunnel, which supplies the lake in question with water, as well as the unpatented claims known as the "Sunlight" and "Starlight," and that they continued to own the same and the water of Thayne lake until they conveyed the same to the defendant, in 1895, and that the Thayne and Jeannette tunnel was constructed by him long prior to 1886, and was located upon the Thayne patented mining claim, and that he then developed the stream of water in controversy, which ever since has afforded the principal supply and source of water to Thayne or Shadow lake; that he located the Starlight and Sunlight claims in 1881, and made a relocation of each of said claims subsequently, on the 10th day of January, 1883; that all of said mining and patented claims were located upon vacant, unpatented mineral lands of the United States, and that such locations were made and assessment work done in accordance with law; that the Thayne and Starlight lie together, and substantially embrace what is known as "Thayne Lake," and that through his permission and license the plaintiff was allowed to insert its pipe line into said lake for the purpose of supplying water to its mines; that the Pinto mining claim was located over the Starlight while it was a valid claim; that he constructed the Jeannette tunnel prior to 1886; and that he and his co-locators owned said claims and water until they sold



them to the defendant, in May, 1895. Many of the facts stated in this and other affidavits are disputed by counter affidavits. In fact, the complaint and the affidavits in support of it, and the equities therein alleged, are, so far as material, substantially met and denied by the answer and the affidavits in support of it. The allegation in the complaint that the defendant built its pipe line across the plaintiff's mining claim without authority is met by the answer, which alleges that permission was granted by the superintendent of the plaintiff company to lay said pipe line, and that the plaintiff afterwards tore said pipe line up, whereupon said defendant replaced it, and maintained it by guarding it. The complaint leaves in doubt what quantity of water the plaintiff appropriated, or what quantity it is entitled to use; as against the defendant and other appropriators; and it does not clearly appear from it that defendant had not acquired and did not own the water referred to in the complaint, as the water of prior appropriators, which plaintiff did not appropriate, and no definite or certain quantity of water from the lake is alleged to belong to the plaintiff. Nor does it appear that any written notice of its appropriation of the water was ever posted or recorded.

The order appealed from, restraining the defendant from taking water, “\* \* \* except that the said defendant, during the irrigating season of each year, is allowed and permitted to take from the waters of said Shadow lake an amount of water equal to the amount heretofore used by the grantors of said defendant, and reasonably necessary for irrigating certain lands, formerly owned by one Sullivan and his grantors, described in the proofs in this action,” is quite indefinite and uncertain, when taken in connection with the uncertain allegations in the complaint as to the quantity of water appropriated by the plaintiff and other appropriators.

*Smith v. Phillips*, 6 Utah, 376. We do not consider it necessary at this time to review in detail the conflicting testimony presented by *ex parte* affidavits on this hearing; nor shall we undertake to lay down any rule of law governing the case, beyond the order we make. It is apparent that this court cannot, on the present showing, safely determine the rights of these parties, upon the pleadings and conflicting testimony presented. That determination can only be reached upon a trial, where the witnesses can be heard and examined in a way to sift their candor, recollections, and truthfulness. The main issue to be determined is whether the defendant or the plaintiff owns these mines, and has the right to use the water flowing from the Thayne and Jeanette tunnel into Thayne's or Shadow lake. From the pleadings and testimony, it is plain that the respective rights of these parties are uncertain and indefinite,—so much so that the right of neither party can safely be determined from the uncertain and conflicting testimony presented upon *ex parte* affidavits. When this is the case, and it appears, as it does in this case, that continuing the injunction until the hearing will work great injury to one of the parties, without corresponding benefit to the other, then the injunction should not continue, when adequate protection to the parties can be had without it. *McGregor v. Silver King Min. Co.*, 45 Pac. 1091; *Swift v. Jenks*, 19 Fed. 643.

Concerning the effect of the order now made, so far as it operates to allow the defendant's pipe line to lie undisturbed for a portion of its length through certain mining claims of the plaintiff, alleged to be unused for any purpose, and of no value, we may say further that, as appears now, under the pleadings, the defendant can have no legal right to occupy the plaintiff's property with its

pipe line, nor interfere with the plaintiff's right of dominion over it,—rocky, barren, vacant, though it may be,—unless its assertion of a license so to do is substantiated. If the license is proven, many authorities sustain the right claimed. *Campbell v. Railway Co.*, 110 Ind. 490; *Russell v. Hubbard*, 59 Ill. 335; *Williams v. Flood*, 63 Mich. 487; *Rhodes v. Otis*, 33 Ala. 578; *Rerick v. Kern*, 14 Serg. & R. 267; 13 Am. & Eng. Enc. Law, 551; *Railroad v. Mitchell*, 69 Ga. 114; *Railroad v. McLanahan*, 59 Pa. St. 23; *Wilson v. Chalfant*, 15 Ohio 248; *Clark v. Glidden*, 60 Vt. 702; *Gibson v. Association*, 33 Mo. App. 177-180; *House v. Montgomery*, 19 Mo. App. 170; *Baker v. Railroad Co.*, 57 Mo. 265; *Cook v. Pridgen*, 45 Ga. 331; *Stephens v. Benson*, 19 Ind. 367; Ang. Water Courses, § 318.

As this matter is of minor importance,—the injury caused by such occupancy, in any event, being merely nominal, and susceptible of full compensation in damages,—we think all questions concerning the acts alleged to constitute a license to the defendant, the authority of any particular officer of the plaintiff company to grant it, if it shall finally appear that any permission in fact was purported to be granted, and all contentions as to the legal effect of such acts, may well be remanded to the district court for fuller investigation; and we see no urgent reason for disturbing the condition of affairs as to this point, any more than any other. The *status quo* established by the court below has existed for 13 months, and an early trial on its merits is entirely practicable; and the order we shall make, in effect, leaves all interests in precisely the same condition as during that period, and as left by the court below, pending the appeal, in the order which granted the injunction, and at the same time prescribed the conditions upon which the appeal should be taken. Under these circumstances, we are of the opin-

ion, and therefore order, that the temporary order appealed from be, and the same is hereby set aside, upon the condition and when the defendant herein shall cause to be executed on its behalf, and filed with the clerk of the district court, a good and sufficient bond, in the penal sum of \$25,000, to be approved by the clerk of the district court, conditioned that the defendant will pay all damages which the said plaintiff may sustain by, through, or from the laying or being of the pipe line or pipe lines through and across the lands of plaintiff, if it be finally determined that its construction was, or maintenance is, wrongful, and the diversion of the water through said pipe and pipe line, and all damages which the plaintiff may recover in this suit against the defendant for and upon account of the alleged trespass and diversion of the water of said Shadow lake, and other matters and wrongs alleged in the complaint, if the plaintiff's contention as to such matters, or any of them, is finally sustained. And it is further ordered that in the meantime, and pending the final hearing of this suit, or until the further order of the district court, or the judge thereof, the plaintiff and defendant herein observe and preserve the status of the properties described in the pleadings, so far as the pipe lines of the respective parties are involved, as it existed at the commencement of this suit, and that the costs of this proceeding shall abide the final result of the case.

RITCHIE, District Judge, concurs.

STREET, District Judge (dissenting):

I concur in the judgment upon the appeal, in so far as it vacates and sets aside the interlocutory injunction, but dissent from so much of the order made as preserves the status of the parties *pendente lite* respecting the following

mining claims, to wit: The Aetna, lot 196; the Hecla, lot 197; the Rebellion, lot 193, the Climax, lot 174; the Senate, lot 235; the James A. Garfield, lot 236; the Walker and Walker Extension, lot 40. The order appealed from, being analyzed, is seen to enjoin the defendant upon the following distinct matters: First, defendant is enjoined and restrained from taking or diverting from Thayne's or Shadow lake, by its pipe line or otherwise, any water or waters therein; second, defendant is further enjoined from taking or diverting from any visible source of supply or tributaries of said lake, including the stream of water issuing from the Jeanette or Thayne's tunnel, any water or waters; third, defendant is enjoined from taking any water from plaintiff's pipe line; fourth, defendant is also enjoined from entering upon certain mining claims, including those named above, and from using, or attempting to use, upon said mining claims, its pipe line described in the complaint. The slight modification of the first section of the order contained therein is not relevant to the subject under discussion. As to the two subdivisions first named, the parties set up absolutely conflicting claims of legal rights to both the land and water in question; and I concur in reverting both plaintiff and defendant to the final hearing, and denying relief *pendente lite*. As to the third subdivision, no ground for any relief, other than damages, is shown. This inquiry relates to the preservation of the status of the parties as to the mining claims above named, and covered by the fourth subdivision of the injunctional order as herein outlined. The title of the plaintiff to these claims, as against defendant, is not disputed; but the defendant sets up as a defense to the complaint of plaintiff an alleged license, averred to have been originally granted by the general manager of the plaintiff corporation. Some expenses incurred in pursuance of the license, and user for some

months, constitute substantially the entire defense the defendant makes to justify it in maintaining its pipe line upon plaintiff's ground against its will and protest. It is not shown that the board of directors of the plaintiff corporation ever knew of the license, or in any way assented thereto; and the expenditure is not shown to have been so disproportionate to the use heretofore enjoined as to incline a court to apply the well-recognized principles of estoppel, by which a license not made irrevocable by some agreement of the parties will be held so as a matter of law, the estoppel being established by the evidence. The great weight of authority supports the view that such a license as is attempted to be set up by defendant, even though the act of the general manager be construed as the act of the corporation, is revocable; and, the license being admitted to having been revoked, the defendant's answer states no defense whatsoever as to the use of its pipe line in and from the mining claims in question, and no issue for trial can arise thereon. There is no question of fact to be determined. To raise an issue, the defendant must plead facts sufficient to constitute a defense, or form a cause of action for affirmative relief. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384; *Jackson v. Railroad Co.*, 4 Del. Ch. 180.

Can it be held that under any circumstances the unauthorized and unratified act of a general manager of a corporation can vest in a licensee, content with such authority, an irrevocable license in corporate realty. The allegations and admissions of the pleadings make it clear that the plaintiff revoked the license, and the conclusion is irresistible that under such circumstances the defendant, in thereafter relaying its pipe line, and by compulsion continuing the use thereof, became a mere trespasser, and subject to an action in damages. Why, then,

preserve a status which substantially continues a trespass? High, Inj. § 700. In my opinion, the court, to be consistent, should relieve both plaintiff and defendant of any restriction whatsoever upon their respective remedies relating to the particular mining claims in question. Plaintiff, having been denied injunctive relief, should not be debarred from seeking his remedy in damages, even though repeated suits may be necessary. Why revert him to his remedy at law, and then forbid him taking any steps to secure it? As to the defendant, it sets up, as one of the grounds upon which the interlocutory injunction should be denied, that it intended to condemn a right of way for its pipe line through these claims. Should it not have an opportunity to proceed with such a course, if it so desires, and test to the court of last resort, if necessary, its right to acquire such right of way under the constitution of our state and the statutes in force respecting condemnation of land for use for such a purpose? This cannot be done in the pending action, and I dissent from the order tying the hands of the parties so they cannot seek their respective remedies in this matter until the case be decided. As to the mining claims heretofore named, and admitted to belong to plaintiff, no bond should be permitted. As to the other rights in dispute, if the defendant had not tendered its bond, *pendente lite*, to answer in damages to plaintiff if damages should be awarded it upon the trial of the cause, there would seem to be no foundation in law for requiring it. By the decision the parties are practically reverted to the trial of their respective titles to the ground occupied by the mining claim in dispute, and to the trial of their claims to the water connected therewith; and as injunctive restraint on either side, pending the final hearing, is denied, why should one party give its bond to answer in damages, rather than the other? But, the defendant having

offered to give its bond, I dissent only from the order requiring it, in so far as it is part of the proceedings to preserve the status of the parties respecting the undisputed property of plaintiff.

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STATE OF UTAH v. ALBERT F. HOLDEN.

MASTER AND SERVANT—EIGHT-HOUR LAW—CONSTITUTIONALITY.

1. Plaintiff, in violation of a state law, employed one H. to labor in a mine more than eight hours per day. Upon fine and imprisonment, plaintiff petitioned the supreme court for a writ of *habeas corpus*, contending that the law limiting the time of labor in mines to eight hours a day was unconstitutional. Section 1, p. 219, Laws 1896, declares that "the period of employment of working men in all underground mines shall be eight hours per day, except in cases of emergency, where life or property is in imminent danger." The constitution having declared that "the legislature shall pass laws providing for the health and safety of employes in factories, smelters and mines," the court will not hold the act without such constitutional authority if there is any reasonable doubt that it is not calculated to promote the health and safety of such employes.
2. The court will not hold that an act is not within the police power of the state unless it is so clearly without as to remove every reasonable doubt that it is.
3. If the power of the legislature to pass the law is conceded, it cannot be said in this case there is any deprivation of liberty without due process of law.
4. While the powers of the national government consist of those delegated, those of the state government embrace such as are not forbidden.

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5. The first clause of the fourteenth amendment to the constitution of the United States makes all persons described in it citizens of the United States, and of the state where they reside,—citizens of two distinct governments.
6. The second clause of the same section prohibits the state from denying to any person therein his privileges and immunities as a citizen of the United States. His privileges and immunities as a citizen of the state are left to the protection of the state.
7. The third clause of the section forbids the deprivation of life, liberty, or property, except by virtue of valid laws. If the state law in this case was valid, the process was valid.
8. The last provision of the section prohibits the denial by the state, to any person within its jurisdiction, the equal protection of the law. And a law may be limited to the dangers peculiar to a particular industry, without denying to any person the equal protection of the law.

(No. 725. Decided Oct. 29, 1896.)

Application for writ of *habeas corpus* by Albert F. Holden, convicted in a justice's court of a violation of the eight-hour law respecting the employment of laborers in mines, against Harvey Hardy, sheriff.

Writ discharged, and petitioner remanded.

*Marshall & Royle, Dickson, Ellis & Ellis, and Bennett, Harkness, Howat & Bradley*, for petitioner.

The act is in violation of section 7, article 1, of the constitution of this state. "Sec. 7. Art. 1. No person shall be deprived of life, liberty or property without due process of law."

It is also in violation of section 1, article 14, of the constitution of the United States. "Sec. 1. Art. 14. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, lib-

erty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law."

What is due process of law?

"In the celebrated case of *Dartmouth College v. Woodward*, 4 Wheaton 519, Mr. Daniel Webster gave the following definition of the due process of law: 'By the law of the land, is more clearly intended, the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land.'"

The privilege of contracting is both a liberty and a property right. *Frorer v. People*, 141 Ill. 171; *Ramsey v. People*, 142 Ill. 380; *Cooley Const. Lim.* 484.

The proposed law is class legislation in this:

It deprives mining and smelting employers of the right to make contracts, which persons and corporations in all other lines of business have the right to make. It deprives employers and employes in these lines of business of the equal protection of the law. It is in violation both of the spirit and letter alike of the constitution of the United States, and the state of Utah. *State v. Loomis*, 115 Mo. 307; *People v. Otes*, 90 N. Y. 48; *State v. Goodwell*, 33 W. Va. 179; *State v. Coal & Coke Co.*, 33 W. Va. 188; *W. Va. Fire Creek Co.*, 6 L. R. A. 359; *Commonwealth v. Perry*, 34 Cent. L. J. 78; *Millett v. People*, 117 Ill. 294; *Frorer v. People*, 142 Ill. 387; *Ragio v. State*, 86 Tenn. 272; *Braceville Coal Co. v. People*, 147 Ill. 66; *Perry v. Commonwealth*, 155 Mass. 117; *Eden v. People*, 161 Ill. 296; *In re 8-hour Law*, 39 P. R. (Colo.) 328; *In re House Bill 107*, 39 P. R. (Colo.) 431; *Godcharles v.*

*Wigeman*, 6th Atl. (Pa. St.) 354; *Low v. Printing Co.*, 59 N. W. (Neb.) 362; *Ramsey v. People*, 142 Ill. 380.

In the case of *Ritchie v. The People*, 155 Ill. 98, a statute of Illinois was passed upon, providing: "No female shall be employed in any factory more than eight hours in any one day or forty-eight hours in any one week."

The act was held unconstitutional and in violation of fundamental principles, both as class legislation and as depriving women of the equal protection of the law.

In 98 N. Y. 98, *In re Jacobs*, the court had under consideration a law of New York prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses, etc.

The law was held unconstitutional—the court says: "To justify this law it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manufacture may be injurious to those who are engaged in its preparation and manufacture; but it would have to be injurious to the public health \* \* \* What possible relation can cigar making in any building have to the health of the general public?"

The last quoted lines become very pertinent to the issue at bar: What possible relation can the limitation of hours of labor in mines and smelters have to the safety, health and welfare of the general public?

It is not a question whether the employment is injurious to the workman, but whether it is prejudicial to the health, comfort or safety of the general public.

On the other hand, if the exercise of such a power is constitutional, and not forbidden by the declaration of rights, it is manifest that a law could be enacted, which would provide that the period of employment should be twenty hours per day, and that no contract should be made or carried out contrary to its provisions, without

incurring the penalties denounced; and so such a power, if exercised, would prove an engine of destruction of the property rights and liberties of the workingmen.

The supreme court of Colorado has decided the precise question here presented, and held that, "it is not competent for the legislature to single out the mining, manufacturing, and smelting industries of the state, and impose upon them restrictions with reference to the hours of their employés, from which other employers of labor are exempt. An act such as proposed would be manifestly in violation of the constitutional inhibition against class legislation. The bill submitted also violates the right of parties to make their own contracts—a right guaranteed by the bill of rights, and protected by the fourteenth amendment to the constitution of the United States." 39 N. E. Rep. 329.

So it was held in Colorado in March, 1895, upon the same language in the declaration of rights, and also upon section 1 of the fourteenth amendment, the opinion citing many cases in the different states. *In re House Bill No. 203*, 39 S. E. Rep. 431-2. So in *Low v. Rees Printing Co.*, 24 Lawyer's Rep. Ann.

Speaking of the latest case from Missouri on these subjects with approval, *State v. Julow*, 31 S. W. 781, the circuit court further says: "The court then further holds that to deny a citizen the right to make free and valid contracts for his labor is to deprive him of 'liberty without due process of law,' and that any statute which undertakes to make such an act, otherwise innocent and lawful, a criminal offense, constitutes 'legislative judgment' without trial or sentence, and that any such legislation is unconstitutional and void. The court further finds the statute there unconstitutional, because it is class legislation—because it is a statute which undertakes to regu-

late the rights and conduct of one class of citizens, without reference to all other classes."

Laws of the character of the one in question have been held unconstitutional and void in California, Illinois, Colorado, Nebraska, Arkansas, Pennsylvania, West Virginia, Missouri and Ohio, and the principles upon which the decisions are grounded are to be found throughout the text books of the law, and the writings of our most learned and patriotic statesmen, and are supported by the great weight of authority, if not all the authorities, and upheld in the light of constitutional principles which cannot safely be ignored.

*C. S. Varian, O. W. Powers, and A. C. Bishop, Attorney General, for the state.*

Cited: *People v. Ewer*, 70 Hun 239; *On Appeal*, 141 N. Y. App. 129; *Peo. v. Warden*, 144 N. Y. App. 529; *Beers v. Mass.*, 97 U. S. 32; *People v. Bellett*, 99 Mich. 151; *Com. v. Hamilton Co.*, 120 Mass. 383.

The constitution is specific on this subject. It declares that eight hours shall constitute a day's work on public works, and further, commands that, "the legislature shall pass laws to provide for the health and safety of employes in factories, smelters and mines." Article 16, section 6.

This is mandatory. Article 1, section 26.

The determination of the question of regulation is, by this provision, committed to the legislature. The law enacted has relation to the purpose contemplated, and this ends the controversy.

Since 1888 a somewhat restricted right of eminent domain has attached by legislative grant to the business of mining. C. L. sec. 3841, *et seq.*; Laws 189, pp. 37-8-9.

By act, approved and taking effect April 5, 1896, six days after the act under consideration was approved, the business of producing and reducing ores was declared to be of "vital necessity to the people of the state of Utah;" to be a pursuit "in which all are interested and from which all derive a benefit."

In express terms, mining and milling (smelting) ore were declared to be for the *public use*, and the right of eminent domain was granted. Laws, 1896, p. 316.

The validity of similar legislation is established by decisions in a neighboring state. *Dayton Mining Co. v. Seawell*, 11 Nev. 394; *Overman Mg. Co. v. Corcoran*, 15 Nev. 148.

The mine and mill owners have sought and obtained a legislative declaration that their business was for the *public use*, with the accompanying right of eminent domain. They are within reasonable legislative control in the exercise of occupations claimed to be, and by legislative act *declared* to be, affected with a public use. The mine and mill owners can not successfully challenge the very authority by which they are permitted to exercise special privileges. *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517.

The grant of special privileges and particularly of the right to exercise the *state's right* of eminent domain, subjects the business to legislative control. *Georgia Banking Co. v. Smith*, 128 U. S. 179.

*Ritchie v. People*, cited from 155 Ill. 101, is much relied upon in support of petitioner's contention. The Illinois statute prohibited the employment of any female in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week. In adjudging this statute to be unconstitutional, the court expressly concede—as was done in the prior Illinois cases above referred to—that under cer-

tain circumstances the regulation of employments is within the lawful authority of the state.

In the opinion it is said: "But there is nothing in the nature of the employment contemplated by the act which is in itself unhealthy or unlawful or injurious to the public morals or welfare."

And again: "It is not the nature of the things done, but the sex of the persons doing them, which is made the basis of the claim that the act is a measure for the promotion of the public health." "As a general thing, it is the province of the legislature to determine what regulations are necessary to protect the public health and secure the public safety and welfare."

But the court proceeds to say, and this is the *ratio decidendi*: "The mere fact of sex will not justify the legislature in putting forth the police powers of the state for the purpose of limiting the exercise of those rights, unless the courts are able to see that there is some fair, just and reasonable connection between such limitation and the public health, safety or welfare proposed to be secured by it." *Ritchie v. People*, 155 Ill. 98.

Finding nothing in the title nor act to indicate that it was a sanitary measure, and seeing nothing in the nature of the employment sought to be regulated, which in itself was unhealthy or injurious to public morals, the court refused to sustain the law.

*Chas. J. Pence and J. H. Murphy*, also for the state.

"The party who wishes us to pronounce a law unconstitutional, takes upon himself the burden of proving beyond a doubt that it is so." Cited with approval by the court in *Powell v. Com.*, 114 Pa. St. at page 270.

And the same rule is announced in *State v. Coal Co.*, 36 W. Va. 835-838; *Munn v. Ill.*, 94 U. S. 123; *Pa. R. R.*

v. *Riblet*, 66 Pa. St. 164; *University of Cal. v. Barnard*, 57 Cal. 612; *Sinking Fund Cases*, 99 U. S. 718.

"Only when it violates the constitution *clearly, palpably, plainly*, and in such manner as to leave no doubt or hesitation in our minds." *Sharpless v. Mayor*, 59 Am. Dec. 782; *State v. Ah Chew*, 40 Am. Rep. 490; Marshall, C. J., in *Fletcher v. Peck*, 6 Cranch 87.

Cited with approval in *Ah Lim v. Ty*, 1 Wash. St. 159; *State v. Addington*, 77 Mo. 110; *State v. Laughlin*, 75 Mo. 147; *Leep v. Ry.*, 58 Ark. 414-415; *Newland v. Marsh*, 19 Ill. 385.

That the law may seem unreasonable, oppressive or absurd, or that there may be objection to its policy, are not questions for judicial inquiry. It must be in direct conflict with some *expressed* prohibition of the constitution. *Cooley's Const. Lim.* 164; *Pattison v. Yuba*, 13 Cal. 175; *Leonard v. Wiseman*, 31 Md. 201; *Com. v. McWilliams*, 11 Pa. St. 61-70; *Davis v. State*, 3 Lea 376; *Williams v. Commack*, 27 Miss. 209; *Ah Lim v. Ty*, 1 Wash. St. 162.

"Due process of law undoubtedly means, in the due course of legal proceedings according to the rules and forms which have been established for the protection of private rights." 12 N. Y. 209; *Davidson v. New Orleans*, 96 U. S. 103.

"Legislation is not open to the charge of depriving one of his rights without *due process of law*, if it be general in its operation *upon the subjects to which it relates*." *Dent v. West Va.*, 129 U. S. 124; *Railroad v. Humes*, 115 U. S. 512; Miller, J., *In re Brosnahan*, 18 Fed. Rep. 67.

Under the powers inherent in every sovereignty a government may regulate the conduct of its citizens toward each other, and when necessary for the public good, the manner in which each shall use his property. *Munn v. Ill.*, 94 U. S. 113; *People v. Budd*, 117 N. Y. 14.

"It is now well established that the fourteenth amend-



ment created no new rights whatever, but only extended the operation of existing rights to a certain class (the negro) hitherto excluded, and furnished additional protection to such rights. The power to control and regulate civil rights of citizens is still reserved to the state, except that no distinction may be made between classes on account of race, color or previous condition of servitude." 18 Am and Eng. Ency. Law, 755; *Barbier v. Connelly*, 113 U. S. 27; *U. S. v. Cruikshank*, 92 U. S. 542; *Slaughterhouse Cases*, 16 Wall. 36; *Mugler v. Kansas*, 123 U. S. 633 *et seq.*; *Butcher's Union v. Crescent City Co.*, 111 U. S. 746; *Stone v. Miss.*, 101 U. S. 814; *New Orleans Gas Co. v. Louisiana Lt. Co.*, 115 U. S. 650; *Beer Co. v. Mass.*, 97 U. S. 25; *Patterson v. Kentucky*, 97 U. S. 501; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659-667; *Powell v. Penn.*, 127 U. S. 678; *Slate v. Coal Co.*, 36 W. Va., 826.

And before the adoption of the fourteenth amendment the sole right of the state to regulate its internal trade, etc., in the exercise of the police power is recognized. *License Tax Cases*, 5 Wall. 462; *U. S. v. Dewitt*, 9 Wall. 41; *Com. v. Alger*, 7 Cush. 53.

The fact that the title of the statute does not declare that it is enacted for the health and safety of employes in smelters and mines is not important. This is not necessary for the validity of a penal statute. *Ah Lim v. Ty.*, 1 Wash. St. 165; *People v. West*, 106 N. Y. 297.

ZANE, C. J.:

The plaintiff was found guilty of a misdemeanor by a justice of the peace, who assessed a fine against him of \$50, and, upon a refusal to pay, committed him. To obtain his liberty, he has presented this petition for a writ of *habeas corpus*.

The offense charged consisted of employing one William Hooley in underground mining more than eight hours

per day, in violation of a law entitled "An act regulating the hours of employment in underground mines, and in smelting and ore reduction works," as follows:

"Section 1. The period of employment of working men in all underground mines or workings shall be eight (8) hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 2. The period of employment of workingmen in smelters and all other institutions for the reduction or refining of ores or metals shall be eight (8) hours per day, except in cases of emergency where life or property is in imminent danger.

"Sec. 3. Any person, body corporate, agent, manager or employer, who shall violate any of the provisions of sections 1 and 2 of this act, shall be deemed guilty of a misdemeanor."

This statute limits the hours of employment of laboring men in underground mines and smelters, or other works for the reduction of ores or refining of metals, to eight hours per day.

The question for our consideration and decision is, had the legislature the power to enact this law?

Article 16 of the constitution of this state is as follows (Laws Utah 1896, p. 219):

"Section 1. The rights of labor shall have just protection through the laws calculated to promote the industrial welfare of the state.

"Sec. 2. The legislature shall provide, by law, for a board of labor, conciliation and arbitration which shall fairly represent the interests of both capital and labor. The board shall perform duties, and receive compensation as prescribed by law.

"Sec. 3. The legislature shall prohibit: (1) The employment of women, or of children under the age of four-

teen years, in underground mines. (2) The contracting of convict labor. (3) The labor of convicts outside prison grounds, except on public works under the direct control of the state. (4) The political and commercial control of employes.

"Sec. 4. The exchange of blacklists by railroad companies, or other corporations, associations or persons is prohibited.

"Sec. 5. The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation.

"Sec. 6. Eight hours shall constitute a day's work on all works or undertakings carried on or aided by the state, county or municipal governments; and the legislature shall pass laws to provide for the health and safety of employes in factories, smelters and mines.

"Sec. 7. The legislature, by appropriate legislation, shall provide for the enforcement of the provisions of this article."

The first section of the act makes it the duty of the legislature to protect the rights of laboring men by the enactment of just laws calculated to promote the industrial welfare of the people,—such laws as will be just to all classes. The command is to the lawmaking department of the state, and the only express limitations upon the power are that such laws shall be just, and calculated to promote the welfare of the industrial classes. The legislature must decide whether the law is just and adapted to the purpose named; and unless the law is so palpably unjust, or so clearly not calculated to promote the purposes mentioned in the constitution, as to remove every reasonable doubt that it is unjust, or that it is not calculated to promote the purpose expressed in the con-

stitution, the court should not hold it without the scope of the authority mentioned in that instrument. The first clause of section 6 declares that "eight hours shall constitute a day's work on all works or undertakings carried on or aided by the state, county or municipal government." We presume the object of this provision was to protect the laboring man from the injurious consequences of prolonged physical effort, and to give him the remainder of the 24 hours for his own personal affairs, and for the cultivation of his mental and moral powers, the acquisition of useful knowledge, and for rest and sleep. The second clause of the section commands the legislature to pass laws "for the health and safety of employes in factories, smelters and mines." This provision must be regarded as an expression of the will of the people of the state with respect to the subjects and objects of legislation named in it; and they possessed all the power to enact laws with respect to such subjects that the people of the United States had not conferred in the national constitution exclusively on that government. Any law adapted to the preservation of the health or safety of employes in factories, smelters, or mines is within the scope of this provision. The law must be connected with some of the objects named, and calculated to effect that purpose. If it is not so connected and adapted, the court has the right to hold that it is not within the scope of the provision. But, if there is a reasonable doubt as to the connection and adaptation, the advisability must be held by the court to have been with the lawmaking power. The court must be able to see clearly that the law was not so connected before holding it void for that reason. If the power to pass the law is conceded, the court cannot set it aside because it may deem its enactment unnecessary or injudicious, or because the court may think that experience has proven it so, or

because the court may think itself more sagacious than the legislature, and can therefore see more clearly that the law will retard rather than promote progress and prosperity, and will be a detriment to the common good when actually applied to human affairs amid the conditions of the future.

This brings us to the question: Is the first section of the statute limiting the period of employment of laboring men in underground mines to eight hours per day, except in cases of emergency, where life or property is in imminent danger, calculated to protect the health of such laboring men? The effort necessary to successful mining, if performed upon the surface of the earth, in pure air, and in the sunlight, prolonged beyond eight hours, might not be injurious, nor affect the health of able-bodied men. When so extended beneath the surface, in atmosphere laden with gas, and sometimes with smoke, away from the sunlight, it might injuriously affect the health of such persons. It is necessary to use artificial means to supply pure air to men laboring in any considerable distance from the surface. That being so, it is reasonable to assume that the air introduced, when mixed with the impure air beneath the surface, is not as healthful as the free air upon the surface. The fact must be conceded that the breathing of pure air is wholesome, and the breathing of impure air is unwholesome. We cannot say that this law, limiting the period of labor in underground mines to eight hours each day, is not calculated to promote health; that it is not adapted to the protection of the health of the class of men who work in underground mines.

While the provision of the constitution under consideration makes it the duty of the legislature to enact laws to protect the health and to secure the safety of men working in underground mines, and in factories and

smelters, it does not prohibit the legislature from enacting other laws affecting such classes, to promote the general welfare. While the constitution of the United States is a delegation of powers to that government, with some express limitations upon the powers conferred, it also contains limitations upon the powers of the states. The government which it created is regarded as one of enumerated and delegated powers. On the other hand, while the state constitution contains some mandatory provisions, with others, distinguishing the departments of the government, and specifying the duties of various officers thereof, it contains many limitations upon the state, and is regarded in a general sense as a limitation upon the state government. The authority of the general government is ascertained from the powers delegated, while those of the state government are ascertained from those not prohibited. The powers of the first are described by those delegated, and the powers of the latter consist of those not prohibited. This leaves the state legislature in the possession of all the lawmaking power not prohibited to it by the constitution of the United States, or the laws made in pursuance of it, or by the state constitution. The enactment of some laws is made mandatory. The enactment of others is left to the discretion of the legislature, as the public welfare may demand. Among the mandatory provisions of the constitution of this state is the one under consideration.

It is claimed that the enactment of the statute in question was forbidden by section 7 of article 1 of the constitution of the state, which is that "no person shall be deprived of life, liberty or property without due process of law." The petitioner insists that his trial was not, and that his imprisonment is not, according to "the law of the land," because the statute fixing the period of labor of a laboring man in underground mines was, as he claims,

forbidden by the constitution, and therefore void. If the legislature had power to pass the law, there was no valid objection to his trial, fine and imprisonment. If the law was valid, the usual and ordinary process was adopted. If it was not valid, the defendant was deprived of his liberty without due process of law. It is also insisted that the provisions of the state law were forbidden by section 1 of amendment 14 of the constitution of the United States, as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." This section declares: (1) That all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. They are made citizens of two distinct governments. (2) It declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The enactment of state laws depriving or abridging the privileges or immunities of citizens of the state is left to the state legislature so far as this provision goes. It secures to citizens of the United States, in any state, privileges and immunities of the citizens of that state. Expounding the provision now under consideration, the supreme court of the United States said: "The constitutional provision there alluded to did not create those rights which it called 'privileges' and 'immunities' of citizens of the state. It threw around them in that clause no security for the citizen of the state in which they were claimed and exercised; nor did it pro-

fess to control the power of the state government over the rights of its own citizens. Its sole purpose was to declare to the several states that 'whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more or less, shall be the measure of the rights of citizens of other states within your jurisdiction.'" Slaughterhouse Cases, 16 Wall. 76. As the plaintiff is a citizen of this state, the second clause of the first section last above quoted has no bearing upon his case, as his privileges and immunities must be ascertained from the constitution of the state and its laws. The third clause of the section declares that no state shall "deprive any person of life, liberty or property without due process of law." This, in effect, is the same as section 7 of article 1, of the state constitution, and means process authorized by the law of the land. And, as we have seen, if the state law which the plaintiff was charged with violating was valid,—if the legislature had power to pass it,—there was no substantial objection to the process. It was suitable and proper to the nature of the case, and sanctioned by the established usages of the courts.

The last clause of section 1 of amendment 14 of the federal constitution declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The slaves in the various states in which slavery existed having been liberated during the late war, congress deemed it necessary to make them citizens of the United States, and forbade the states the denial to them the equal protection of the law. At that time the laws of all the states in terms gave equal protection to all white persons. This amendment, however, is general, and forbids the denial to any class of persons the equal protection of the laws, by any state; and we have no doubt that class legislation is forbidden. But some pur-



suits are attended with peculiar hazards and perils, the injurious consequences from which may be largely prevented by precautionary means, and laws may be passed calculated to protect the classes of people engaged in such pursuits. It is not necessary to extend the protection to persons engaged in other pursuits not attended with similar dangers. To them the law would be inappropriate and idle. So, if underground mining is attended with dangers peculiar to it, laws adapted to the protection of such miners from such danger should be confined to that class of mining, and should not include other employments not subject to them. And if men engaged in underground mining are liable to be injured in their health, or otherwise, by too many hours' labor each day, a law to protect them should be aimed at that peculiar wrong. In this way, laws are enacted to protect people from perils from the operation of railroads, by requiring bells to be rung and whistles sounded at road crossings, and the slackening of the speed of the trains in cities. So, the sale of liquor is regulated to lessen the evils of the liquor traffic, and other classes of business are regulated by appropriate laws. In this way, laws are designed and adapted to the peculiarities attending each class of business. By such laws, different classes of people are protected by various acts and provisions. In this way, various classes of business are regulated, and the people protected, by appropriate laws, from dangers and evils that beset them; safety is secured, health preserved, and the happiness and welfare of humanity promoted. All persons engaged in business that may be attended with peculiar injury to health or otherwise, if not regulated and controlled, should be subject to the same law; otherwise, the law should be adapted to the special circumstances. The purpose of such laws is not advantage to any person or class of persons, or disadvantage to any

person or class of persons. Necessary and just protection is the sole object.

An ordinance of the city and county of San Francisco prohibited the washing and ironing of clothes in public laundries and washhouses within certain prescribed limits of the city and county from 10 o'clock at night until 6 o'clock on the morning of the following day; and one Soon Hing was fined and imprisoned for a violation of it, and he petitioned for a writ of *habeas corpus*, on the ground that the ordinance was void, because it discriminated between the class of laborers engaged in the laundry business and those engaged in other kinds of business; that it discriminated between laborers beyond the designated limits and those within them; that it deprived the petitioner of the right to labor, and, as a necessary consequence, of the right to acquire property; and that the board had no power to pass it. The writ was denied by the lower court, and the judgment was brought before the supreme court of the United States, and affirmed by that court. Among other things, that court said, in its opinion: "The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discriminations can be said to impair that equal right which all can claim in the enforcement of the laws." *Soon Hing v. Crowley*, 113 U. S. 703; *Barbier v. Conolly*, 113 U. S. 27.

Our attention has been directed to the rule by which the court should be governed in deciding upon the constitutionality of the law in question, and reference is

made to the case of *Dartmouth College v. Woodward*, 4 Wheat. 629, wherein Chief Justice Marshall, in delivering the opinion of the court, said "that in no doubtful case would it [the court] pronounce a legislative act to be contrary to the constitution." In the Sinking Fund Cases the same court said: "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this statutory rule." 99 U. S. 700; *Powell v. Pennsylvania*, 127 U. S. 678. In this last case the constitutionality of a statute of Pennsylvania, prohibiting the manufacture or sale, or offering for sale, or having in possession with intent to sell, oleomargarine butter, was questioned. No evidence was offered on the trial in the court even to prove that the oleomargarine was impure or unwholesome. On the contrary, there was an offer to prove that it was a wholesome and nutritious article of food, in all respects as wholesome as butter, produced from pure unadulterated milk, or cream from unadulterated milk. The court held that whether the manufacture of oleomargarine of the kind described in the statute involved such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit its manufacture and sale to go on, were questions of fact and of public policy which belonged to the legislative department to determine, and that the court could not interfere without usurping powers committed to the legislative department. The case of *People v. Warden of City Prison* held the enactment of a law prohibiting any person from exercising the calling of a master plumber without passing an examination, be-

fore a board of examiners, a valid exercise of the police power. In its opinion, the court further held that, if legislation is calculated to protect the public health and promote the public comfort and safety, the exercise of the legislative discretion is not the only subject of judicial review, but those measures must have some relation to those ends. 144 N. Y. App. 529.

We have examined a number of authorities to which reference has been made, and those which we deem most pertinent to the case in hand we will further examine in this opinion. Judge Cooley says: "Whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature, in the particular case, in respect to the subject matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits, and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. We must assume that legislative discretion has been properly exercised." Cooley, *Const. Lim.* (6th Ed.) p. 220. The same author says, at pages 200 and 201, "that except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case." Undoubtedly, sovereignty resides in the people, and their will is expressed in constitutions and laws,—in constitutions in the mode prescribed, and in statutes through the legislature; and, if the law is in harmony with the federal and state constitutions, it must stand until the lawmaking power changes it. It is the duty of the court to interpret, construe, expound, and apply the law, whether it be expressed in constitutions or in statutes, or whether it be the common law. But

courts have not been intrusted with the lawmaking power. That power is in the hands of another department of government. The supreme court of Massachusetts, in the case of *Com. v. Hamilton Manfg Co.*, held that a law declaring that a woman should not be employed at labor by any person, firm, or corporation in any manufacturing establishment more than 10 hours in any one day, except in certain cases, and in no cases more than 60 hours a week, was constitutional and valid. In deciding the point, the court said: "It does not forbid any person, firm, or corporation from employing as many persons or as much labor as such person, firm, or corporation may desire; not does it forbid any person to work as many hours a day or week as he chooses. It merely provides that, in an employment which the legislature has evidently deemed to some extent dangerous to health, no woman shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legislation can be maintained, either as a health or police regulation, if it were necessary to resort to either of these sources for power. This principle has been so frequently recognized in this commonwealth that reference to the decisions is unnecessary." 120 Mass. 383.

In the case of *Ritchie v. People*, 155 Ill. 98, the following provision of a statute of that state was held unconstitutional and void: "No female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week." Act June 17, 1893, § 5. In deciding upon the law, the court said that the police power of the state enables it to promote the health, comfort, safety, and welfare of society, and that it was very broad and far-reaching, but that it was not without its limitations; that "legislative acts passed in pursuance of it must not be

in conflict with the constitution, and must have some relation to the ends sought to be accomplished,—that is to say, to the comfort, welfare, or safety of society.” And, further on, the court also said: “But the police power of the state can only be permitted to limit or abridge such a fundamental right, as the right to make contracts, when the exercise of such power is necessary to promote the health, comfort, welfare, and safety of society or the public.” Just preceding the statement of this proposition, reference is made to an inference, and to a natural law: “There is no reasonable ground—at least, none which has been made manifest to us in the argument of counsel—for fixing upon eight hours in one day as the limit within which woman can work without injury to her physique, and beyond which, if she works, injury will necessarily follow.” The court assumed a very wide discretion in passing upon the reasonableness and appropriateness of the law, which is pronounced absolutely void. In *Frorer v. People*, 141 Ill. 171, the court held a statute unconstitutional which made it unlawful for any natural or legal person, while in the business of mining or manufacturing, to engage or be interested in keeping or controlling any truck store, shop, or scheme for the furnishing of supplies, tools, clothing, provisions, or groceries to employés. The court said in its opinion that, “in all that relates to mining and manufacturing wherein they differ from other branches of industry, we recognize the supremacy of the general assembly to determine whether any, and, if any, what, statutes shall be enacted for their welfare, and that of operatives therein, and necessarily affecting them alone. But keeping stores and groceries or supplies of tools, clothing, and food, by whatever name, to sell to laborers in mines and manufacturing, is entirely independent of mining and manufacturing.” And said, further, that it did not regulate

the duties of employer and employé in respect to mining; that it imposed disabilities as to contracting as to tools, clothing, and food, matters as to which all laborers in every other branch of industry are permitted to contract without any restriction. The principal objection to the law was that it was unequal. The court said that it was impossible, under the police power, that what is lawful if done by A, if done by B can be a misdemeanor, the circumstances and conditions being the same. A law of the state of New York to improve the public health by prohibiting the manufacture of cigars and the preparation of tobacco in tenement houses in certain cases was held unconstitutional by the court of appeals. While the act professed to be a health law, the court was of the opinion that it was not. The court said: "It is plain that this is not a health law, and that it has no relation to the public health,"—and for that reason held it of no effect. *In re Jacobs*, 98 N. Y. 98.

We do not agree with defendant's counsel that the business of mining is affected with a public interest, and the legislature had the power to pass the law for that reason. Mines are used by private persons or corporations, who have the exclusive use and control of them, as a farmer may own his farm, and have the exclusive use and control of it. The fact that the business may benefit the public does not give the public any interest in the mine or its business, or affect it with a public interest. It is not like the railroad business. Such property and business are owned by a private corporation, but the use of the road is in the public. Travelers and shippers have a common right to use the road for such purposes, by paying fares or freights. The same may be said of similar other classes of business affected with a public use and interest. On this point the court said, in the last-cited case: "Although the legislature may declare

it to be public, that does not necessarily determine its character. It must, in fact, be public; and, if it be not, no legislative fiat can make it so." *In re Townsend*, 39 N. Y. 171; *In re Deansville Cemetery Ass'n*, 66 N. Y. 569; *In re Eureka Basin Warehouse & Manuf'g Co.*, 96 N. Y. 42; *Rockwell v. Nearing*, 35 N. Y. 302.

But while the business of mining may not be affected with a public interest, the legislature may enact laws adapted to the promotion of the health and safety of men working in underground mines. Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does exist to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public good. The legislature cannot, by any contract, divert itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, "*Solus populi suprema lex*;" and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Beer Co. v. Massachusetts*, 97 U. S. 25.

The section of the statute whose constitutionality is involved in this case includes all employes and employers engaged in working underground mines. None are omitted who may be subject to the peculiar conditions that attend such mining. The provision of the state constitution quoted makes it the duty of the legislature to "pass laws to provide for the health and safety of employes in factories, smelters and mines." And we are not authorized to hold that the law in question is not calculated and adapted in any degree to promote the health and safety of persons working in mines and smelt-



ers. Were we to do so, and declare it void, we would usurp the powers intrusted by the constitution to the lawmaking power. The discharge of the petitioner is denied, and he is remanded to the custody of the sheriff named, until discharged according to law.

BARTCH and MINER, JJ.: In concurring in this opinion we do not wish to be understood as concurring in that part of it wherein it is stated: "We do not agree with defendant's counsel that the business of mining is affected with a public interest, and the legislature had the power to pass the law for that reason;" "that the business of mining is not affected with a public interest;" or that the public have no interest in mining, etc. To this part of the opinion we withhold our assent. The question is too important to be passed upon without full argument and investigation.

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### THE STATE *v.* ALBERT F. HOLDEN.

#### CONSTITUTIONAL LAW—EMPLOYMENT OF MINERS—HOURS OF LABOR.

*Held*, that section 2, p. 219, Sess. Laws 1896, under which defendant was convicted, is not unconstitutional; and the section is upheld on grounds similar to those stated in the opinion rendered in the case of *State of Utah v. Holden*, 14 Utah 71.

(No. 725. Decided Nov. 11, 1896.)

Appeal from the Third district court, Salt Lake county. Albert F. Holden was convicted of violating the act regulating the hours of employment in mines, and appeals. *Affirmed.*

*Marshall & Royle, Dickson, Ellis & Ellis, and Bennett, Harkness, Howat & Bradley,* for appellant.

*A. C. Bishop, Attorney General, C. S. Varian, O. W. Powers, Chas. J. Pence, and J. H. Murphy,* for the State.

ZANE, C. J.:

The defendant was convicted of a violation of section 2 of "An act regulating the hours of employment in underground mines, and in smelters and ore reduction works," as follows:

"Section 1. The period of employment of workingmen in all underground mines or workings shall be eight (8) hours per day, except in cases of emergency, where life or property is in imminent danger.

"Sec. 2. The period of employment of working men in smelters and other institutions for the reduction or refining of ores or metals shall be eight (8) hours per day, except in cases of emergency, where life or property is in imminent danger.

"Sec. 3. Any person, body corporate, agent, manager or employer, who shall violate any of the provisions of Secs. 1 and 2 of this act, shall be deemed guilty of a misdemeanor."

Sess. Laws Utah 1896, p. 219.

The case is analogous to the case of the *State of Utah v. Albert F. Holden*, 14 Utah 71, except that the defendant in that case was convicted of a violation of the first section of the above act, in employing a workingman in underground mining more than eight hours per day, and the

conviction in this one was for the employment of one William Hooley, in his concentrating mill, for the reduction of ores, more than eight hours per day. The conditions with respect to health of laborers in underground mines doubtless differ from those in which they labor in smelters and other reduction works on the surface. Unquestionably, the atmospheric and other conditions in mines and reduction works differ. Poisonous gases, dust, and impalpable substances arise and float in the air in stamp mills, smelters, and other works in which ores containing metals, combined with arsenic or other poisonous elements or agencies, are treated, reduced, and refined; and there can be no doubt that prolonged effort day after day, subject to such conditions and agencies, will produce morbid, noxious, and often deadly effects in the human system. Some organisms and systems will resist and endure such conditions and effects longer than others. It may be said that labor in such conditions must be performed. Granting this, the period of labor each day should be of a reasonable length. Twelve hours per day would be less injurious than fourteen, ten than twelve, and eight than ten. The legislature has named eight. Such a period was deemed reasonable.

The people of the state, in their constitution, made it mandatory upon the legislature to "pass laws to provide for the health and the safety of the employes in factories, smelters and mines." Const. Utah, Art. 16, § 6. We do not feel authorized to hold that the statute quoted was not designed, calculated, and adapted to promote the health of the class of men who labor in smelters and other works for the reduction and treatment of ores. Nor can we say that the law conflicts with any provision of the constitution of the United States. Nor do we wish to be understood as intimating that the power to pass the law does not exist in the police powers of the state. The author-

ity to pass laws calculated and adapted to the promotion of the health, safety, or comfort of the people, and to secure the good order of society, and the general welfare, undoubtedly is found in such police powers. The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore, it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments. Though reasonable doubts may exist as to the power of the legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order, or promote the general welfare, we must resolve them in favor of the right of that department of government.

For a more extended consideration of the questions raised by the assignment of errors in this case, the opinion filed in the case between the same parties, *supra*, is referred to. That case we now reaffirm as governing this one. The application for the discharge of the defendant is denied, and he is remanded to the custody of the sheriff, until released in pursuance of law.

BARTCH and MINER, JJ., concur.

THEODORE BUNNELL, APPELLANT, v. THOMAS  
CARTER, RESPONDENT.

MORTGAGES—TRANSFER OF PROPERTY—SUBROGATION—DISCHARGE  
OF MORTGAGOR.

Plaintiff sold certain property to defendant, who gave therefor his promissory notes, secured by a mortgage on the same. The defendant then sold the property to D, subject to the mortgage, and D sold it to C, under like conditions. Neither D nor C assumed or agreed to pay the mortgage, but the interest on the notes was paid by them. The time of payment of the notes was extended by the plaintiff, the mortgagee, without the knowledge or consent of the defendant, the mortgagor. The property was at all times, up to the maturity of the notes, worth the full amount of the mortgage, but declined greatly in value thereafter, and was worth less at the end of the time to which payment had been deferred than the mortgage. When the property was sold on a foreclosure, and the sheriff's sale showed a deficiency, plaintiff claimed a deficiency judgment against defendant, which was denied by the court: *Held* that, by the right of subrogation, the mortgagor, after conveyance, and after maturity of the mortgage, might pay the debt, and secure his safety upon the land, and that when the mortgagee and grantee extended the time of payment, without the knowledge and consent of the mortgagor they took away the latter's right of subrogation, and imposed upon him a new risk, not anticipated, and never consented to. The mortgagor stood to the end, as he was in the beginning, the sole principal debtor, but, on account of the depreciation of the value of the mortgaged security, liable only to the extent of the land, which depreciated during the time of the extension of the notes. The extension of time took away his right of subrogation, and discharged him to the extent of the value of the land. Being once discharged, he could not again be made liable. From the time of the extension, the risk of future depreciation fell upon the creditor, and he assumed the

14 100  
15 466  
13 467

risk of obtaining his money out of the land; and defendant was released from liability for the deficiency reported due on the mortgage.

(No. 724. Decided Oct. 15, 1896.)

Appeal from the Third district court, Salt Lake county.  
Hon. LeGrand Young, *Judge*.

Action by Theodore Bunnell against Thomas Carter to foreclose a mortgage and to obtain a deficiency judgment. From a judgment denying the deficiency judgment, plaintiff appeals. *Affirmed*.

*Frank Pierce*, for appellant.

Neither Dooly nor Campbell assumed payment of the notes. They cannot, and never could, be held personally liable on them. If Carter is relieved, we are left in the anomalous position of having promissory notes without a principal or even a surety. This is not reasonable. Carter was primarily liable. He remains so until his liability is shifted to some other person. It never has been shifted. The respondent does not even contend that it was shifted to the grantees in the deeds. Neither of them assumed any liability. They were therefore neither principals nor sureties. *Elliott v. Sackett*, 108 U. S. 132.

Reason and precedent are against the position taken by the trial court. The United States supreme court had the same question before it, and decided that the mere conveyance of premises subject to an incumbrance did not change the primary liability of the original maker of the incumbrance, and that a shifting of liability could be accomplished only when the grantee assumed the outstanding obligation and the original payee accepted the assumption, and that an extension without an assumption did not relieve the maker of the note. *Sheperd v.*

*May*, 115 U. S. 510; *Maier v. Lanfrom*, 86 Ill. 518; 1 Jones on Mortgages, § 742; *Teeters v. Lamborn*, 43 Ohio St. 144.

*Williams, Van Cott & Sutherland*, for respondent.

The question is whether a mortgagor is discharged from liability for the depreciation of mortgaged property occurring during extensions of payment after the maturity of the mortgage debt, when payment of the debt is extended by the mortgagee and grantee of the mortgagor, without the consent of the mortgagor, when liability is not assumed by the grantee.

The case in 108 U. S. 132, cited by appellant, neither involves nor discusses the question at bar.

The case in 115 U. S. 510, is somewhat similar in principle to the case at bar, except in the very important particular that it was neither pleaded nor in the case *whether the security depreciated during the extension, or depreciated at all*; hence that court did not pass on that point, but that point is the only one for decision in this case. Suppose in the case at bar it did not appear that there had been any depreciation in value. Then, as a matter of course, the case would be reversed, because the mortgagor has a right to complain only to the extent of the depreciation in value of the mortgage security.

The authorities in 86 Ill. 518, 43 Oh. St. 144, and 1 Jones on Mortgages, § 742, do not discuss the question involved here; so far as 43 Oh. St. 144 does decide, it is practically opposed to a unanimous line of decisions to the contrary. See: *Union Mut. Life Ins. Co. v. Hanford et al.*, 27 F. R. 588; *George v. Andrews*, 45 Am. Rep. 706 (60 Md. 26); *Calvo v. Davies*, 73 N. Y. 211; *Murray et al. v. Marshall*, 94 N. Y. 611; *Metz v. Todd*, 36 Mich. 473; 1 Jones on Mortgages, sec. 742.

MINER, J.:

In February, 1890, appellant was the owner of property in Salt Lake City, and sold it to respondent, Thomas Carter, and took from him, as part payment, two promissory notes made by Carter, of \$1,500 each, payable on or before February 5, 1891, and February 5, 1892, respectively, with annual interest. These notes were secured by a mortgage on the property, which was duly recorded. This action was brought to foreclose the mortgage, and for a deficiency judgment against Carter, the respondent. On April 2, 1890, Carter conveyed the premises to John E. Dooly, by general warranty deed, subject to the incumbrance of the \$3,000 mortgage. On October 3, 1893, Dooly conveyed the premises to A. G. Campbell, by general warranty deed, subject to the same mortgage. Neither Dooly nor Campbell assumed or agreed to pay the mortgage. Carter, the respondent, paid no interest on the notes after conveyance to Dooly, nor was he at any time called upon or requested to pay any interest on either note. The interest was paid by Dooly or Campbell. On October 12, 1891, payment of the notes, by agreement between the plaintiff and the owner of the property, was extended to October 12, 1892, and afterwards likewise extended until February 5, 1894. These extensions were without the knowledge or consent of the respondent, Carter, the maker of the notes. The property covered by the mortgage was worth the full amount of the mortgage debt at all times between October 11, 1891, and the maturity of the last note, February 6, 1892; but since said time said property has depreciated in value, and is not now worth the mortgage debt. Upon a foreclosure and sale of the property, the sheriff returned a deficiency of \$1,357.30. The court denied the appellant's motion for a deficiency judgment against Carter, the maker of the



notes, for this sum, and rendered its decree accordingly. From this decree and judgment, this appeal is taken.

While it is true that a purchaser who assumes the mortgage becomes as to the mortgagor the principal debtor, and the mortgagor a surety, yet, under such circumstances, the mortgagee, unless he assented to such an agreement, may treat both as principal debtors, and may have a personal decree against both. So where the purchaser, having assumed the payment of an existing mortgage, he thereby becomes the principal debtor, and the mortgagor a surety of the debt merely, and an extension of the time of payment of the mortgage, by an agreement between the holder of it and the purchaser, without the consent of the mortgagor, discharges the mortgagor from liability upon it. 1 Jones, Mort. §§ 741, 742; *Calvo v. Davics*, 73 N. Y. 211.

But the facts in this case are different from those stated. The question here presented is whether the mortgagor is discharged from liability on account of the depreciation of the mortgage security below the debt during the period covered by the extension of payment after maturity, where the payment of the debt was extended by the mortgagee and grantee of the mortgagor, without the consent of the mortgagor, and when liability was not assumed by the grantee. In this case, at the maturity of the second note, the premises were ample to discharge the debt, but the notes were extended for two and three years by the mortgagee and grantee, and during this period of extension the property depreciated, and was not worth the mortgage debt at the expiration of the time to which it was extended. While no strict and technical relation of principal and surety arose between Carter, the mortgagee, and his grantee, Dooly or Campbell, from the conveyance of the land subject to the mortgage, still an equity did arise, which could not be taken

from the mortgagor without his consent, and which bears a close resemblance to the equitable right of a surety, the terms of whose contract have been modified. Dooly or Campbell, as grantees of Carter, could not properly be denominated "principal debtors," because they owed no debt; and yet the land which they owned was the primary fund for the payment of the mortgage, and the mortgaged property stands liable to the extent of its value, for the payment of the mortgage. So, as grantee with respect to the land, and to the extent of its value only, they stand in the relation of principal debtors, and to this extent only the mortgagor has the equities of a surety. This result follows from the right of subrogation which inheres to the original conveyance from Carter to Dooly, made subject to the mortgage which Carter executed. As against Dooley, Carter had the right to require that the land should be first exhausted in payment of his mortgage. The amount of the mortgage was deducted from the purchase price, the tacit understanding, at least, being that the land should pay the debt as far as it would go. Through this right of subrogation, the mortgagor, after conveyance, and after maturity of the mortgage, may pay the debt, and secure his safety upon the land. This was a right that Carter had which could not be invaded with impunity. But it was invaded when the mortgagee and the grantee extended the time of payment without the knowledge or consent of Carter. They, for the time at least, took away Carter's right of subrogation, and imposed upon him a new risk, not anticipated and never consented to. The value of the land at the maturity of the notes was more than sufficient to pay the mortgage. By the extension, increased accumulations of interest were to be expected. The mortgagee had no right to modify or destroy Carter's original right of subrogation. In making the extension, he acted at his peril. ✓

The grantees, Dooly and Campbell, stood in *quasi* relation of principal debtors, only in respect to the value of the land as the primary fund, and to the extent of its value. That value being less than the mortgage debt, they owed no debt or obligation whatever beyond it; but the mortgagor stood to the end, as he was in the beginning, the sole principal debtor, but, on account of the depreciation in the value of the mortgaged security, liable only to the extent of the value of the land, which is shown to have depreciated during the time of the extension of the notes, and to be less in value than the face of the mortgage. The measure of his injury was his right of subrogation, and that was necessarily measured by the value of the land. The extension of time took away his right of subrogation, and discharged him to the extent of the value of the land. Being once discharged, he could not again be made liable. From the time of the extension of payment by the mortgagee, the risk of future depreciation fell upon the creditor, who, by the extension, practically took the land as his sole security to the extent of its then value, and assumed the risk of obtaining that value out of it in the future.

In *Murray v. Marshall*, 94 N. Y. 611, the court say: "For conceding the general rule to be that the surety is discharged utterly by a valid extension of the time of the payment, and that the mortgagor stands in the position, and has the rights of a surety, it must be steadily remembered that he can only be discharged so far as he is surety; that he holds that position only up to the value of the land, and beyond that is still principal debtor, without any remaining equities." The mortgagor has a right to complain in this case only to the extent of the depreciation of the value of the mortgage security, which decreased during the period of time covered by the extension of the time of payment, and which deprived him of

his right of subrogation, and so impaired his equitable rights as mortgagor as to discharge him from liability to the extent of the value of the land, which is shown to be less than the face of the mortgage, and to the extent of any deficiency judgment. *Murray v. Marshall*, 94 N. Y. 611; *Clark v. Mackin*, 95 N. Y. 346; Jones, Mortg. §§ 740-742; *Metz v. Todd*, 36 Mich. 473.

We are of the opinion that the plaintiff, by treating with the grantee in the manner stated, and extending the time of payment beyond maturity, to a period when the land depreciated in value below the face of the mortgage, and in dealing with the land, which constituted the primary fund for the payment of the mortgage in a manner to deprive the mortgagor of his right to resort to it for indemnity, the defendant, Carter, was released from liability for the deficiency reported due upon the mortgage. We find no reversible error in the record. The order and judgment appealed from are affirmed, with costs.

ZANE, C. J., and BARTCH, J., concur.

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J. N. ESLINGER, RESPONDENT, v. ARTHUR PRATT,  
APPELLANT.

SALT LAKE CITY—CHIEF OF POLICE—POWER TO SUSPEND OFFICERS  
—RIGHT OF APPEAL.

1. The plaintiff and respondent was sergeant in the police force of Salt Lake City, and was dismissed by the defendant, as chief of police, for a violation of the rules promulgated by said chief and for insubordination. A report of said dismissal was duly made to the board of police and fire commissioners,

who affirmed the action of the chief by a refusal to reinstate the plaintiff. The defendant had promulgated rules for the regulation of his department, under authority conferred upon him by section 10 of the Session Laws of 1896 (page 223). The board did not adopt rules which the said section 10 conferred the power upon them to adopt, but were equally divided as to what, if any, rules should be adopted. Held that, in the absence of any rules, promulgated by the board, to limit the authority of the chief of police to make rules, the latter was authorized to make and enforce the regulations which the law empowered him to make; that in the following clauses of section 10: "It shall be their [the chief of police and chief engineer] duty to make and enforce rules and regulations to secure discipline in their respective departments. They shall have power, under such rules as the board may establish, to suspend without pay, fine not to exceed ten dollars, or dismiss any subordinate,"—the word "under" means "subject to"; and that the intention of the legislature was to grant the power to the chiefs to suspend, etc., but to give the board the authority to limit or qualify the power, and, since the board had failed to exercise this power under the authority of the law, the regulations of the chiefs must prevail, and the duty of seeing that the employes faithfully discharged their duties, as he was required to do under section 8 of the same law (page 222), justified him, subject to the approval of the board by a failure to reinstate, in the dismissal of the plaintiff. This construction is reinforced by the use of the word "may," a word here used undoubtedly in a primary or permissive sense.

2. The right of appeal is guaranteed under section 3634, Comp. Laws 1888.

(No. 719. Decided Oct. 18, 1896.)

Appeal from the Third district court, Salt Lake county.  
Hon. John A. Street, *Judge*.

Respondent filed an affidavit to obtain an alternative writ of mandate, claiming that his dismissal from the police force was wrong, as the board of police and fire commissioners had not adopted any rules at the time of the dismissal. The board were equally divided on the

adoption of rules. The case further shows that the respondent applied to be reinstated after the dismissal and that the board refused to reinstate. The writ was issued and the appellant as chief of police demurred and answered, and on the hearing the court found for the respondent and awarded a peremptory writ. Defendant appeals. *Reversed.*

*Williams, Van Cott & Sutherland*, for appellant.

*C. S. Varian*, as *amicus curiæ*.

The clause "under such rules as the board may establish," in section 10, is a qualifying one, and marks the grant of power to the chiefs. It is not a *proviso*, but is a part of the enacting clause of the grant of power. Under settled rules, it must be construed rationally and in accord with the common understanding of the language and with relation to its context. No reasonable person in reading this language could adopt the forced and unnatural construction of appellant. The legislature has not said: "they shall have power to suspend, etc., provided the board may make such rules restricting such power," but, it has written, "they shall have power *under* such rules as the board may establish, etc." That is in accordance with such rules. It is clearly contemplated that the board will make rules, and it is quite immaterial whether the word is "may" or "shall." Either means the same in this connection. The word "must" would be incongruous and inharmonious in the sentence as it is placed.

When cases shall arise not provided for by rule, under section 11, the chiefs may prefer charges. The chiefs may prescribe rules of discipline, but the penalties for a breach thereof must be defined by rule of the board, when they may be enforced by the chiefs.

It is not perceived that section 14 authorizes a different construction. The reference to "the pleasure of the respective chiefs" does not indicate a *grant* of power. For the grant of power we look to section 10, and "the pleasure of the respective chiefs, or a majority of the board" in section 14, is limited by "as herein provided." If "the pleasure of the chiefs," etc., is susceptible of the interpretation claimed, then it is clearly contrary to the general purview of the act as well as of section 10, and must look for an interpretation which will enable us to harmonize it with the entire act. Sutherland, Statutory Construction, sec. 238.

The language used is inapt and unfortunate, since it cannot, taken literally by itself, express the true intent of the legislature, which as before shown, was not to leave the question to the *pleasure* of the chiefs. So, these words must be read as the general and true intent requires. Sutherland, secs. 218, 246, 429.

That is to say, the word "pleasure" within the general purview of the act, cannot be given its literal meaning. As limited by "as herein provided," the necessity for a restricted meaning is more apparent.

It being clearly shown that the board is the head of the department, and intrusted with full supervisory power and control, it must be apparent that the chief has no right of appeal here. Such right is inconsistent with proper discipline and subordination. He has no right connected with the removal or non-removal of a member of the force, which authorizes him to test the action of the board in this way. The board has *acted*, acquiescing in the judgment of the court, and has reinstated the man. The case as originally presented to the court below, is not now before this court. In accordance with the statute, rules governing the imposition of penalties have been promulgated. The judgment of this court

interpreting the statute would be inoperative. Therefore this appeal should be dismissed.

MINER, J.:

The respondent filed an affidavit in the court below to obtain an alternative writ of mandate. It appears from the affidavit that on May 9, 1896, the respondent was a policeman and sergeant of police of Salt Lake City; that the board of police and fire commissioners of Salt Lake City was duly appointed and organized under the act of the legislature approved March 30, 1896; that said board have not formulated, adopted, or promulgated any rules or regulations, as provided by section 10 of said act, under which the chief of police could lawfully act, and that no such rules are in force; that Arthur Pratt was, on the 9th day of May, 1896, and for a long time prior thereto had been, chief of police; that, while respondent was acting as policeman, on said 9th day of May, 1896, the said Arthur Pratt, chief of police, without filing any charges against the respondent, assumed to dismiss the respondent from said office of policeman and sergeant of police, and refused to permit him to exercise his duties as such, although he has repeatedly applied to be reinstated to his position; that respondent has made application to the board, at its regular session, to be restored, and the board has refused to grant his request; that said chief of police did not at the time, nor since his dismissal, file any charges against respondent; that said dismissal, and the refusal of the chief of police and said board to restore him, were unlawful,—and prays for an alternative writ of mandate, requiring said chief of police and board to restore him to his office. The board of police and fire commissioners of Salt Lake City answered, admitting the facts stated as true, but alleged: That the chief of police, at the next regular meeting of said board after



respondent's dismissal, reported in writing to the board his reasons for such dismissal as follows: "For wilfully violating the inclosed written orders, for using disrespectful language to the chief of police, and gross insubordination." (The written orders and rules are set out as hereinafter stated in the answer of the chief of police.) That the board have been and are equally divided in members and opinion upon the construction and interpretation of said law, and for that reason have failed and neglected to formulate and promulgate rules and regulations, under section 10 of said law, to govern punishments thereunder by the chief of police. Appellant, Arthur Pratt, as chief of police, filed his demurrer to the affidavit and writ, alleging that they do not state facts sufficient to constitute a cause of action or to afford any relief. Arthur Pratt, chief of police, together with Frank W. Jennings and Louis Cohn, two of said board, answered: Denying that any rules should be adopted by said board before said chief of police can lawfully act in dismissing, fining or suspending. That said plaintiff at said time was dismissed by said chief for gross insubordination, for disrespect to said chief, and for violating the rules of said department. That at the next regular meeting of said board the chief of police reported to the board his reasons for such dismissal in language following: "Salt Lake City, May 9, 1896. To the Hon. Police and Fire Commissioners: Gentlemen—I have this day dismissed from the police department Sergeant J. N. Eslinger. He was dismissed for the following reasons: For wilfully violating the inclosed written orders, for using disrespectful language to the chief of police, and gross insubordination. Arthur Pratt, Chief of Police."

"Salt Lake City, May 6, 1896. Special orders for May 8th and 9th, 1896. First relief will report for duty at 6 o'clock p. m., and remain until further ordered. Sec-

ond relief will report for duty at 10 o'clock a. m. and remain until further ordered. Third relief will report for duty at 6 o'clock p. m., and remain until further ordered. Arthur Pratt, Chief of Police."

That said communication was filed, and said plaintiff appealed to the board for reinstatement, but said board, before the commencement of this action, refused to reinstate said plaintiff for the reasons aforesaid, and refused to disturb the action of the said chief. That on and prior to May 9, 1896, there were made by said chief, and in force in said police department, rules providing that any act of insubordination, or any disrespect to a superior officer, or violation of any of the rules of the said department would be punished by dismissal. That on May 9, 1896, plaintiff was guilty of acts of insubordination in wilfully refusing to remain for duty with said third relief until further ordered, and guilty of disrespect to said chief in imputing to him improper and dishonorable conduct, and guilty of neglect of duty in abandoning said third relief, and leaving his men and quitting said department without permission, and the plaintiff was dismissed for said acts. That said board have not adopted any rules regulating or limiting the power of the chief to suspend, fine, or dismiss, and the board is equally divided as to what, if any, rules should be adopted. The court below found that the dismissal of the plaintiff by the chief of police was unlawful, and ordered that the writ of mandate issue as prayed for, and that the plaintiff have judgment against the defendant for costs. From this order and judgment the defendant Arthur Pratt, chief of police, appeals.

The principal question involved in this appeal is whether the appellant, Arthur Pratt, as chief of police, had power to dismiss the respondent, when the board of

fire and police commissioners had not adopted any rules of their own, and whether such dismissal was lawful under the rules adopted by the chief of police. Section 10, c. 73, p. 222, Sess. Laws 1896, provides that "the chief of police shall be the executive officer of the police department; the chief engineer shall be the executive officer of the fire department; and it shall be the duty of each to see that the laws, orders, rules, and regulations, concerning his department are carried into effect. \* \* \* It shall be their duty to make and enforce rules and regulations to secure discipline in their departments respectively. They shall have power, under such rules as the board may establish, to suspend without pay, fine not to exceed \$10.00, or dismiss any subordinate officer, member or employé of their respective departments, but they shall forthwith report in writing the reasons for such action to the board hereby created, by whom said fine may be remitted, or by whom said subordinate officer, member or employé may be reinstated by a vote of three members, and the action of said chief of either department in suspending, fining, or dismissing any subordinate officer, member or employé unless reversed or modified by said board, and any action of the board thereon shall be final and conclusive, and shall not be reviewed or called in question before any court." It will be noticed that the statute provides that it is the duty of the chief to make and enforce rules and regulations to secure discipline in his department. It appears from the answer that, in accordance with and in obedience to the statute, the chief of police made rules, which were in force in the police department May 9, 1896, providing that any act of insubordination, or any disrespect to a superior officer, or neglect of duty, or violation of any rules of duty of the department, would be punish-

able with dismissal. It also appears from the answer that the plaintiff, on the 9th day of May, 1896, was guilty of insubordination, disrespect, dishonorable conduct, and neglect of duty in violating the rules, for which he was dismissed, and the reasons for such dismissal were reported in writing to the board; that plaintiff appealed to the board for reinstatement, and such board, before the commencement of this action, refused to reinstate the plaintiff, for the reasons given, and refused to disturb the action of the chief. The statute gave the chief power, and made it his duty, to make and enforce rules and regulations to secure discipline in his department. The chief made such rules without objection from the board, and the plaintiff violated such rules. The statute provides that it is the "duty" of the chief to see that the laws, orders, rules, and regulations concerning his department are carried into effect. The only method and manner of enforcing laws and rules by the chief, pointed out by the statute, is by dismissal, suspension, or fine. It is difficult to see how discipline and good government in the departments could be enforced, and the statute carried into effect, without the infliction of the punishment provided by the rule. The board, having adopted no rules of its own, refused to reinstate the plaintiff on his application, and refused to disturb the action of the chief, thereby affirming the order of removal, and the rule under which the removal was made, as well as the act of removal, and the power of the chief to remove. The board never made any rule defining or limiting the powers of the chief, except by their acts in affirming what was done by refusing to reverse or modify the order and reinstate the plaintiff. By the provisions of the statute it was made the "duty" of the chief to make rules and regulations for the express purpose of securing discipline in his department, and, when made, it was equally

his duty, under the statute, to enforce such rules, in order that discipline should be maintained, and the department made efficient, for the purpose for which it was organized. The fact that the board had not adopted rules of its own, and was unable to do so, rendered it still more necessary and proper that the chief should make rules, and enforce them, in order to preserve the necessary and proper discipline in the department, and police protection to the city. Under the rules made it was competent for the chief to remove the plaintiff for the violation of them and his neglect of official duty, as reported to the board, and it was competent for the board to reinstate the officer and reverse the order of dismissal, or to affirm it. The board refused to reverse or modify the order of removal for the reasons given, or to reinstate the plaintiff, and refused to disturb the action of the chief. So far as the board could do, they affirmed by their official acts all that was done by the chief, and recognized his authority to do what was done, and thereby recognized and affirmed the rules adopted by the chief as rules of the department.

But it is contended by the respondent that, in the absence of rules actually adopted by the board, the appellant had no power to dismiss; in other words, that the power to suspend, fine, or dismiss comes from the rules the board may adopt, and not from the statutes, nor from the rules adopted by the chief. The particular provision in the statute following that just referred to reads as follows: "The chiefs shall have power, under such rules as the board may establish, to suspend without pay, fine not to exceed ten dollars, or dismiss any subordinate officer, member or employé of their respective departments." What construction should the words "under such rules as the board may establish" have? The word "under" means "subject to." 27 Am. & Eng. Enc. Law, p. 433. With this interpretation the clause would read,

"They [the chiefs] shall have power, subject to such rules as the board may establish, to suspend," etc. This reading presumes that "under" is used in the sense of "subject to," and, if correct, shows the legislature to have intended to grant the power to the chiefs to suspend, etc., but to give the board the power to limit, or qualify the power; so that the legislature, in using the words of the statute, has granted a present power to the chiefs to suspend, fine, and dismiss, but has given such power subject to the rules that may be established by the board. The word "may," as used in this section, is doubtless used in a primary or permissive sense. *Suth. St. Const.* p. 592, § 462; *Thompson v. Lease*, 22 How. 434; *Miner v. Bank*, 1 Pet. 64; 2 Comp. Laws, § 2996. It is only reasonable, when the legislature has granted the power, to say that the power exists, subject to be qualified or limited by the board, and then such construction would harmonize the entire section. When the legislature used the language, "It shall be their duty to make and enforce rules," etc., "They shall have power under," etc., it must have intended to make it the duty of the chiefs to make and enforce rules, and have power to suspend, fine or dismiss; but, as the chief might abuse the power, the authority was reserved to the board to make other rules, so as to control, disarm, modify, or qualify any abuse of power that might be exercised or assumed, either by rule or act of the chief.

Judgment was rendered against the appellant, and for costs in the court below. Under section 3634, Comp. Laws 1888, he is entitled to appeal. *Hayne*, New Trials & App. § 23. The judgment and decree of the court below is set aside and reversed, with costs, and the writ of mandate prayed for is denied.

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14	406
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14	118
30	28

STATE *v.* HARRY HAYES.HOMICIDE—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY—RES GESTÆ  
OTHER CRIMES.

1. The fact that the testimony in a criminal case is largely of a circumstantial character does not necessarily weaken its strength, if the circumstances are closely clustered together in one unbroken chain of criminating facts, all pointing with unerring certainty to the accused as the author of the alleged crime. Circumstantial evidence may be quite as conclusive as direct evidence, but it is incumbent upon the prosecution, not only to show by a preponderance of the evidence that the alleged facts and circumstances completing the chain are true, but they must also be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the defendant's guilt. The chain of circumstances must be complete and unbroken, and should be established beyond a reasonable doubt.
2. When characterizing the act of the defendant in killing the deceased, it was proper for the jury to view it in the light of all the circumstances to which it was subject at the time. It was proper for the jury to consider the condition of the weather; the ice upon the lake in February, and its absence in April; the size of the bullet, and the direction from which it was shot; whether the bodies were placed under the ice, and how they came to be found upon the shore of the lake; the defendant's efforts to prevent search in the places where the bodies were found, and his condition of mind and manner when viewing the bodies; what he said and did indicating a malicious intent, or the absence of it.
3. It was not error in the counsel for the prosecution, in his opening statement to the jury, to inform them that he expected to show the killing of two other young men besides the one with whose murder the prisoner was charged, and that all three met their death at the same time, at the hands of the defend-

ant. While the general rule is that one crime cannot be offered to prove a similar offense committed against another person at another time, yet where the circumstances tend to show the killing of three persons in a similar manner, and at the same time, and their disappearance at the same time, as one continuing transaction, and the state was reasonably bound to account for the whereabouts of the two persons, companions of the deceased (whose death was not charged to defendant), then in such a case the killing of the one, and the manner and killing of each, bore upon the killing of the others, and tended to explain the motive, acts, and intent of the slayer of the deceased. Such evidence is competent, especially when accompanied by instructions from the court that the jury should not consider it except and so far as it tended to connect the defendant with the crime charged.

4. Where there is evidence sufficient to establish the defendant's guilt, it is for the jury to pass upon its weight, and determine whether or not the defendant is guilty beyond a reasonable doubt.

(No. 720. Decided Oct. 12, 1896.)

Appeal from the Fourth district court Utah county. Hon. W. M. McCarty, *Judge*. Defendant was found guilty, on circumstantial evidence, of the murder of Albert Hayes, alias Albert Ernstrom, and was sentenced to be hung. On appeal the judgment of conviction was affirmed. The facts are stated in the opinion.

*J. W. N. Whitecotton, Chas. De Moisey, and H. C. Edwards*, for defendant.

*A. C. Bishop*, Attorney General, and *Benner X. Smith (E. A. Wedgewood*, of counsel), for the State.

MINER, J.:

The indictment in this case charges the defendant with the crime of murder in the first degree, in shooting and



killing one Albert Enstrom, alias Albert Hayes, in Utah county, February 16, 1895. The verdict of murder in the first degree, as charged, was rendered April 1, 1896, and the defendant was sentenced to be hanged by the neck until dead. From the judgment of conviction, and the order denying defendant's motion for a new trial, this appeal is taken.

The first contention made by the appellant is that there is no evidence in the case tending to prove that the deceased was killed in Utah county, nor that the defendant killed the deceased in Utah county, and that there was no evidence to justify the verdict. We discover from the record that about the 16th day of February, 1895, the defendant or his wife owned a ranch at Pelican Point, on the west shore of Utah Lake, in Utah county, upon which was erected a small dwelling, where the deceased Albert Hayes, Andrew Johnson, and Alfred Neilson, three young men, resided, and took care of the ranch and the stock for the defendant, who was stepfather to Albert Hayes, and who resided at Eureka, Utah, about 20 miles distant. These young men had been missed from the dwelling after the 17th of February, 1895. Search was made, and about the 15th day of April, 1895, the dead body of Albert Hayes was found in the shoal and sand of Utah Lake, partly covered, about one mile from the Hayes ranch, with two bullet holes in his breast, which caused his death. The bullets were shot from the front. His clothes were on. A few days later the dead bodies of Andrew Johnson and Alfred Neilson were found in the lake, about two miles south from where the body of Hayes was found. Each body had on the clothing worn in life. Johnson had a gunshot wound in the breast, shot from right to left, and Neilson had a gunshot wound through from the back of the head, and out over the right eye. These several wounds caused the death of the three

young men, and were mortal wounds, caused by bullets from a gun. The Hayes ranch and house were shown to be in Utah county, Utah, and the country south of the Hayes ranch was for three or four miles in Utah county. A map was introduced showing the lay of the country and locality of the Hayes ranch and corral. The house was 10 or 15 rods from the road, and about 300 yards from the lake. The deceased and his companions were at the house on the ranch on Saturday, February 16, 1895, during the daytime, and were last seen there at 5 o'clock in the afternoon. Parties passing the house on the 18th and 23d of February found no one there, and the doors were locked. The cattle and hogs were found loose and unattended, and the bedding in the house had been changed. On March 9th, the house was entered, and blood marks were found on the floor in several places. The defendant was shown to have made repeated threats against the deceased and his dead companions, and was shown to have made repeated contradictory statements concerning the affair.

Defendant claimed that he had not been to the ranch in February or March, nor between December, 1894, and April, 1895. It was shown that he had said he was going to the ranch on the 15th of February to shoot ducks, and invited a friend to go with him, and that he had started off alone with a cart that day, and returned on the 17th of February, and stated that he had just returned from below. It also appears from the testimony of two witnesses that defendant was seen by them at the ranch on the 17th day of February, fixing a cart. Several witnesses saw him at the ranch between the 10th and 20th of February. On the 16th or 17th of February, Hayes' wife endeavored to borrow a horse to go to the ranch, stating that the defendant was there, and that she desired to go there. It was shown that defendant started false stories

concerning the deceased having left the ranch, and taking away his property, and also that he had received a letter that the boys had gone to Arizona, which was untrue. When the defendant received letters that the boys were gone, and that the stock was starving, he was asked why he did not go down and look after the stock, to which he replied "that he would never go to the ranch again, for it had been a great deal of trouble to them, and he would never go there again." On his return from the ranch, on the 17th of February, he looked pale, acted peculiar; his eyes were bloodshot; he acted crazy-like and nervous; his conduct was extraordinary and unusual. While wringing a friend's hands, he turned him around, and said, "Shake hands with an old criminal." The testimony tended to establish the theory that the boys were shot at about the same time, and placed under the ice.

A witness testified that he heard a conversation between his brother and Hayes shortly after the homicide, and before the bodies were found, as follows: "My brother said to Hayes that he thought Albert was killed first, and then put through the ice,—an air hole in the ice,—and then, the other boys coming back, they being away, that they were then killed to cover up the first crime. Mr. Hayes said: 'There was no ice on the lake when I was down there in February, or rather when I was there in March.' And my brother says; 'Why, Hayes, there was no ice on the lake in March.' And he says: 'Oh, yes; there was ice on the lake in March.' And my brother says: 'I was at Provo as a witness at that time, and there was no ice on the lake then at that period.' And Mr. Hayes replied: 'There are no air holes in the ice when it is frozen solidly, as it would be in the winter.' My brother spoke up, and said: 'This murder will come out.' And Hayes said: 'It will never be found out, not in a thousand years.'" The

defendant was shown to be opposed to taking any steps to find the bodies or the murderer. He failed to identify the body or clothing of his stepson, although the clothing had been previously worn by himself, while others identified both readily. A wagon or cart track was noticed from the house to the lake on the 18th of February. In February the lake was frozen over, and was thawed out in April. When the bodies were being searched for, the defendant attempted to attract the attention of the searchers away from the locality where the bodies were found, and to discourage the search. The harness that the defendant accused the deceased of taking was found in a manure heap on the premises. In April, Mrs. Hayes informed a witness, in presence of her husband, that her husband had killed her boy, and Hayes made no reply except to inquire of witness what was the best to do, and he was advised to notify the officers. Hayes replied that he wanted to keep it still. He did not want to make any noise or excitement, nor inform the officers, but wanted to get a search warrant, and find the things he had before stated were carried away by the boys, or were lost. Mrs. Hayes also stated, in defendant's presence, that he had talked her out of notifying the officers, because he wanted to find his lost property first. Hayes said the ranch belonged to the deceased, and he would not go near it again. He called the other boys "damned scrubs," and said "they were no good anyway." He had threatened to kill the deceased before the occurrence in question, when in a state of anger.

The testimony is replete with other strong criminating circumstances connecting the defendant with the murder of the three boys at about the same time. There was sufficient evidence to go to the jury to establish the defendant's guilt. That being so, it was for the jury to pass upon it, and say whether or not the defendant was

guilty beyond a reasonable doubt. The testimony was largely of a circumstantial character, but that does not weaken its strength and potency where the circumstances are so closely clustered together in one unbroken chain of criminating facts, all pointing with unerring certainty to the defendant as the author of the alleged crime. Circumstantial evidence may be quite as conclusive as direct evidence, but it is incumbent upon the prosecution, not only to show by a preponderance of evidence that the alleged facts or circumstances completing the chain are true, but they must also be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the defendant's guilt. The chain of circumstances must be complete and unbroken, and should be established beyond a reasonable doubt. *People v. Scott*, 10 Utah 217.

In his opening statement to the jury, counsel for the prosecution stated to the jury what the people expected to prove on the trial of the case and that the circumstances of the whole transaction would show that the killing of the deceased and of Johnson and Neilson occurred at one time, and as one transaction; and that all three of the boys met their death at the hands of the defendant, at about the same time; and that it would be impossible to separate the proof of the killing of Albert Hayes from the killing of the other two young men; and that the prosecution would show the killing of the three as part of one transaction. To this statement defendant's counsel objected, and objected to any other evidence being admitted, except as to the killing of Hayes. The objection was overruled, and an exception taken. Thereupon testimony showing the whole transaction was admitted as a part of the *res gestæ*. The court, in its

instructions to the jury on this subject, said: "There has been some evidence introduced by the prosecution in this case of the killing of Andrew Johnson and Alfred Neilson. You are instructed that you must not consider the testimony on this point, except only so far as it may connect the defendant with the crime charged in the indictment; and, if you find that such testimony fails in any way to connect the defendant with the crime charged in the indictment, it is your duty to wholly and absolutely disregard such testimony, and to dismiss the same from your minds, and not consider it in this case. The defendant is only on trial for the crime charged in the indictment, and unless you believe from the evidence, beyond a reasonable doubt, that he is guilty of the identical crime charged in the indictment, it is your duty to acquit him." We are of the opinion that the testimony was properly admitted, and the rights of the defendant were carefully guarded by the court in its charge to the jury. The general rule is that one crime cannot be offered to prove a similar offense committed against another person at another time. But the circumstances shown in this case tend to show that the killing of the three boys, and their disappearance at the same time, were one continuing transaction. The state was reasonably bound to account for the absence or disappearance of Johnson and Neilson, the companions of the deceased. The killing of one bore upon the killing of the others, and tended to explain the motive, acts and intent of the slayer of Hayes.

In characterizing the act of defendant in killing Hayes, it was proper for the jury to view it in the light of all the circumstances to which it was subject at the time. It was proper for the jury to consider the condition of the weather; the ice upon the lake in February, and its absence in April; the size of the bullet, and the direction from which it was shot; whether the bodies

were placed under the ice, and how they came to be found on the shore of the lake; the defendant's efforts to prevent the search in the place where the bodies were found, and his condition of mind and manner when viewing the bodies; what he said and did indicating a malicious intent, or the absence of it. Along with the principal facts, the jury should be given the attending and surrounding circumstances constituting the *res gestæ*. "The affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstance, and, in its turn, becomes the prolific parent of the other; and each, during its existence, has its inseparable attribute, and its kindred facts materially affecting its character, and essential to be known, in order to a right understanding of its nature." The surrounding circumstances, constituting parts of the *res gestæ*, may always be shown to the jury along with the principal facts. *People v. Coughlin*, 13 Utah, 58; 1 Greenl. Ev. 108.

The size and character of the bullet that killed Johnson, and the wound made by it, were proper to be admitted in evidence in connection with the wounds made upon the deceased by a similar bullet, apparently shot from the same gun.

Upon a careful examination of the record, we are unable to find any error. The order and judgment of the court below appealed from are affirmed.

ZANE, C. J., and BARTCH, J., concur.

WEST POINT IRRIGATION COMPANY, PLAINTIFF  
AND RESPONDENT, v. MORONI AND MT. PLEAS-  
ANT IRRIGATING DITCH COMPANY ET AL.,  
DEFENDANTS AND RESPONDENTS. RASMUS CLAW-  
SON ET AL., INTERVENERS AND APPELLANTS.

WATER RIGHTS—INTERVENTION—SUFFICIENCY OF COMPLAINT.

This was a suit in intervention to determine certain rights to the water conducted from the Sanpitch river, through interveners' ditch, onto lands which came into the "rightful possession" of said interveners. To the complaint in intervention, defendants filed a demurrer, alleging that it was not shown by the complaint whether said lands claimed to be owned by interveners are owned or possessed in common or severally by intervener or those he represents, nor who the parties are that claim the waters, nor their individual interest therein. *Held*, that where a complaint avers that the intervener and those he represents own an undivided interest in the said ditch in common, and that they came into the rightful possession of the lands watered by said ditch, and known as the "Ephraim North Meadows," and where it appears from the complaint that the intervener and those whom he represents have a common or general interest in the question involved in the action, and either gain or lose by the direct operation and effect of the judgment, and that the number of persons who would be joined as interveners is so large that it would be impracticable to bring them before the court, the complaint, although not containing the unerring certainty that is desirable, will be sufficient to give the interveners a standing in the court, under sections 3184 and 3190, Comp. Laws Utah 1888.

(No. 788. Decided Oct. 29, 1896.)

Appeal from the Seventh district court, Sanpete county. Hon. Jacob Johnson, *Judge*.



Petition by the West Point Irrigation Company against the Moroni and Mt. Pleasant Irrigating Ditch Company and others, in which Rasmus Clawson and others intervened. From a judgment sustaining a demurrer to their complaint interveners appeal. *Reversed.*

*L. R. Rhodes*, for appellants.

In numerous cases it has been held, that where a number of persons, each having a separate piece of property held by separate and distinct titles, were threatened or suffering from an act that affected them all in the same manner, they might unite in one suit and by one decree obtain complete relief as to all. The cases of *Cadigan v. Brown*, 120 Mass.; *Ballou v. Inhabitants of Hopkinton*, 4th Gray 324, and *Murry v. Hay*, 1st Barb. Ch. 59, are the best illustrations of this doctrine. In *Cadigan v. Brown*, the plaintiffs were individual owners of separate lots abutting on a passage-way, each holding under a distinct title from a different grantor. Defendant began an erection which would permanently block up the passage and interfere with each plaintiff's right of way, and it was therefore a nuisance.

In the opinion, the court says: "The plaintiffs, although they hold their rights under separate titles, have a common interest in the subject of the bill. They are affected in the same way by the acts of the defendant, and seek the same remedy against him. The rights of all parties can be adjusted in one decree and a multiplicity of suits prevented."

In the case of *Ballou v. The Inhabitants of Hopkinton*, individual owners of separate mills on the banks of the stream each drew a supply of water for his own mill from a dam higher up the stream which had been built by all the proprietors. The defendants had begun to draw water from this dam, not removing or in any way inter-

fering with the structure itself, but simply diverting the water so that the supply for each mill was lessened and might be rendered insufficient.

It was held that in one joint suit in equity defendants might be retrained by injunction to prevent a multiplicity of suits.

Our statute provides broadly: "When the question is one of common or general interest, one or more may sue or defend for the benefit of all."

No stronger case can be imagined than the case at bar calling for the application of this doctrine. The relief thus acquired, in a manner common to all, does not depend upon the amount, extent or quantity of each individual interest, but applies in principle to the whole, en masse, let their individual interests be great or small.

The demurrer interposed by the defendants is on the following grounds: (a) "It is not shown whether the lands proposed to be irrigated from the ditch are owned in common or in severalty." (b) "About one hundred persons other than Clawson are interested as owners of certain lands and entitled to the use of the water of the stream for irrigating the same, and that each of them should be made a party so that the right of the defendants and all others may be finally determined and that there may be parties to the record of the claim of use of water for a given quantity of land."

If this doctrine is to prevail, then, in cases of this kind. the ditch is to be ignored and its ownership not considered, except merely as a means of conveying the water, and separate decrees go to each individual land-owner for a given quantity of water. Each individual land-owner would then become the owner of the appropriation, and the individual association or corporation owning the ditch would become simply common carriers destitute of

any ownership in the appropriation of the water, a species of judicial latitudinarianism that is hinted at in a few of the Colorado decisions, but quickly abandoned for the reason that it was impracticable.

An ownership of land is not a necessary precedent to the ownership of an appropriation of water.

*C. S. Varian*, for defendants and respondents, *Thurman & Wedgewood*, for plaintiffs and respondents.

If each of these interveners own land in severalty, and is entitled to the use of water necessarily and reasonably required for the irrigation of such land, in order to adjudicate and determine his rights, not only against the original parties to the suit, but as against his co-interveners, it is necessary for him to allege and prove his appropriation together with the necessity for his use as claimed. Unless he shall allege it, he states no cause of action entitling him to be heard. If without allegation the proofs of such appropriation and use be admitted and made, the other parties, including his co-interveners, as well as the plaintiffs and defendants herein, are taken at a disadvantage because, not having been advised of his interveners they came to the trial without preparation or ability to contest the same.

Even as to the intervener, named Clawson, nothing is shown upon this record as to how much he individually claims, nor as to what quantity of land his title runs. How are we to meet him or contest any of the evidence he may produce? Referring to the bill of intervention, the material parts of which have been stated, it appears that the contention is that the rights of the intervener have been interfered with by the diversion of the waters of the river by plaintiff and defendants miles above the point of diversion of said waters from the river by the intervener. No question at all is made of an interference

with the *ditch* of interveners located  $6\frac{1}{2}$  miles below Moroni, which is, as stated, simply a *conduit* by which the waters are diverted upon their lands; in the *ditch* all of them have a common interest; for the breaking down or the destruction of that *ditch* the injury to one would be the injury to all as co-tenants in the *ditch* and its ownership; all or any number as well as the whole might protect the right and redress the injury. The reason is plain. The relief granted at the suit of one or two or more in any number less than the whole, would accrue to the benefit of the whole if the injunction was granted. The suit of one would be just as effective in its protection of the whole number as if they all had been joined and put their claims right upon the record. But as it stands the question is very different. If these people are entitled in severalty, each one has a particular claim depending upon the acreage of his land, the date and manner of his appropriation, which may be enforced, not only against the original parties to the suit, but against every one of his co-intervenors; each must show an original appropriation, each must show the necessity for the use continuing up to the present time. Only to the extent of his necessity may he maintain and prove his original appropriation.

The rights of some may have been lost by abandonment; some as claimed may never have originated, or may fail through lack of proof; in any event it is manifest that both plaintiff and defendants and all persons properly connected with this suit, claiming rights to the use of the water of the stream, each and all, are entitled to contest *seriatim* every claim so made. This shows, not that the claims of interveners may not be joined and presented in one suit, but that they must be set out and pleaded, and to that end, that each person that desires to be heard must by name be put upon the record

as an intervener, stating his claim and its elements, and thereby, while seeking to avail himself of the prospective benefits of the litigation already instituted without expense or burden to him, also incur the risks and costs necessarily incident to his failure to make good his title. Each is a plaintiff and must prove his case against every other party.

The general rule is that all parties in interest must join in the record. Examples of these exceptions to the general rule are given by the text writers and in decided cases, and the case at bar finds no place among them. Story Equity Pleadings, sec. 97-121; *Newcomb v. Horton*, 18 Wis; *Bonton v. Brooklyn*, 15 Barber 375; *Schultz v. Winter*, 7 Nev. 133.

The intervention should have been amended so as to determine upon its face whether there is a common and general interest in the intervener and those whom he seeks to represent in the waters of this river for irrigation of the North Ephraim Meadows, or whether the interest of each is several. In this last event it is clear that each should have been made a party to the record. *Farmers' Ditch Co. v. Agricultural Ditch Co.*, 3 Col. App. 225.

#### MINER, J.:

Plaintiff filed its complaint against the defendants for the purpose of determining its rights to a certain stream of water known as the "Sanpitch River," in Sanpete county. Defendants answered, claiming interests in the water of the stream, etc. The intervener Rasmus Clawson and others filed their petition for leave to intervene, and, by leave of the court, filed an amended complaint in intervention. The defendants filed a demurrer to the complaint in intervention, alleging that the same does not state facts sufficient to constitute a cause of action,

nor any ground for a rightful intervention; that it is ambiguous, uncertain; and that it is not shown whether said lands claimed to be owned by interveners are owned or possessed in common or severally by intervener or those he represents, nor who the parties are that claim the water, nor their individual interest therein, and because of defect of parties. The demurrers were sustained. Interveners elected to stand upon the complaint, and thereupon said complaint in intervention was dismissed, with costs. Interveners appeal from this order and judgment.

Section 3190, Comp. Laws Utah 1888, provide that “\* \* \* any person may, before trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. \* \* \* ” Under this section, it was competent for the interveners to file their complaint in intervention. Usually, the interest which entitled a person to intervene in a suit between other parties must be in a matter in litigation, and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment. Pom. Rem. & Rem. Rights, §§. 429, 430. Section 3184, Comp. Laws Utah 1888, provides that “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.” Under this provision of the statute, there must be a question of common or general interest to many persons involved in the action, and the question to be determined should be one of common or general interest to all of them, or such persons should be so numerous that it would be impracticable to bring them all before the court; and, in order that the intervener may be entitled to maintain his

action, the facts showing that these requirements of the statute have been complied with must be alleged by the intervener as the ground and reason for adopting this peculiar form of action permitted by the statute. "The complaint or petition must show either that many persons have a common or general interest in the questions involved in the action, or else that the number of persons who would be joined as plaintiffs or defendants, if the ordinary rule was applied, is so very great that it is impracticable to make them all actual parties. Unless the pleading contains these averments, the action must be regarded as though brought by the single plaintiff or against the single defendant named. It should be carefully observed that this provision does not create any new rights of action, nor enlarge any of those now existing. The suit cannot be sustained by one of the representatives of the many others who really sue in his name, unless it could have been maintained if all these many others had been regularly joined as co-plaintiffs, or unless it could have been maintained by each of them suing separately and for himself. The statutory provision is simply a matter of convenience, a rule of form, a means of enabling many persons to have their rights determined without their actual appearance in court as litigant parties." Pom. Rem. & Rem Rights, §§ 389-392; *McKenzie v. Lamoureux*, 11 Barb. 516; *Ballou v. Inhabitants*, 4 Gray 324; *Cadigan v. Brown*, 120 Mass. 493; *Murray v. Hay*, 1 Barb. Ch. 59.

It appears from the complaint "that interveners and company, with about one hundred other persons, own in common a certain ditch, known as the 'Ephraim Meadows Ditch,' which said ditch is taken from the Sanpitch river, in Sanpete county, on the east side of said river, and at a point about  $6\frac{1}{2}$  miles below the town of Moroni; that all the matters and things set forth in this petition are of a

common and general interest to each and all of said parties, said parties owning undivided interests in said ditch; also, that it is impracticable to bring all of said parties before the court, by reason of their great number; that intervener, at the request of all parties, owners of an interest in said ditch, here intervenes in his own behalf and in behalf of all others of common and general interest; that said ditch is used for the purpose of irrigating 1,200 acres of land, known as the 'Ephraim North Meadows'; that said lands are and have been used for raising hay, and require and have required water to be applied to them in order that they may become productive; that the only source from which water can be obtained is from the stream known as the 'Sanpitch River,' said lands lying adjacent to said stream; that in the year 1855, and long before the plaintiff herein or its grantors, or either of the defendants or their grantors, had made an appropriation of water for any purpose whatever from said Sanpitch river, or had begun to cultivate any lands, this intervener and those whom he represents, either in person or by their grantors and predecessors, came into the rightful possession of the lands in the aggregate, known as the 'Ephraim North Meadows,' and thereupon, and during the year 1855, and each year thereafter, appropriated from said Sanpitch river, by means of dams and ditches, water sufficient to irrigate said lands each year thereafter, except when prevented by the wrongful acts of the prior parties to this suit, as hereinafter stated; \* \* \* that commencing with the year 1855, and continuing for each year thereafter, except the years hereinafter mentioned, intervener and those whom he represents, either personally or by their grantors, have diverted or appropriated from said river, in manner as aforesaid, sufficient water to irrigate said lands, known as the 'Ephraim North Meadow'; and such



water has been appropriated and taken from said river in manner as aforesaid, commencing on or about the 1st day of May each year, and continuing until the 10th day of July of each year," etc. It sufficiently appears from the complaint that all the matters and things set forth in the complaint are of a general or common interest to the said intervener and the 100 persons he represents, and to each and all of said parties; and that said parties own an undivided interest in the said ditch in common; and that they came into the rightful possession of the said lands in the aggregate known as the 'Ephraim North Meadows,' consisting of about 1,200 acres of land, and appropriated the water from said stream to irrigate said land, etc. The petition shows with reasonable clearness, although not with that unerring certainty that is desirable, that said intervener and those he represents have a common or general interest in the question involved in the action, and that the number of persons who would be joined as interveners is so large that it would be impracticable to bring them all before the court. The petition seems to cover both provisions of the statute. We are of the opinion that the court erred in sustaining the several demurrers, and in dismissing the complaint in intervention. The judgment, order, and decree of the court below is set aside, with costs, and the cause is remanded for further proceedings.

ZANE, C. J., and BARTON, J., concur.

14	137
15	138

JOSEPH DEDERICHS, RESPONDENT, v. SALT LAKE  
CITY RAILROAD COMPANY, APPELLANT.

14	137
136	294

EVIDENCE—PHOTOGRAPHS.

Where a plain picture or representation produced by the art of photography is verified as a correct representation of the locality at the time of the accident, it is admissible in evidence to enable the court or jury to understand and apply the established facts to the particular case. Such photographic scenes are admissible as appropriate aids to the jury in applying evidence, whether it relates to persons, things, or places.

(No. 742. Decided Oct. 12, 1896.)

Appeal from the Third district court, Salt Lake county.  
Hon. John A. Street, *Judge*.

Action by Joseph Dederichs against the Salt Lake City Railroad Company for damages sustained by plaintiff while crossing defendant's track. From a judgment for plaintiff defendant appeals. Reversed. The case was before this court earlier in the year, and is reported in 13 Utah 34.

*Rawlins & Critchlow*, for appellant.

*Richard B. Shepard*, *A. N. Cherry*, and *H. O. Shepard*, for respondent.

The evidence shows that the collision occurred on the first day of October, 1891, when the trees were in full leaf, and that the photographs were taken on April 6, 1895, when the trees were barren of leaves. It is plain that the photos do not show the point of collision, or in fact any

part of the four corners of the streets where the collision occurred. We contend that they were inadmissible in evidence for these reasons, viz.: First. There was no evidence that the place photographed was in the same condition as when the collision occurred. Second. They were taken three years afterwards. Third. They do not show the point of collision. Fourth. The trees were not in the same condition necessarily as to leaf and size as when the collision occurred. They are immaterial as evidence, for the reason that they show only the row of trees on the north side of Second South and east of Eighth East streets, and were undoubtedly introduced for that purpose, while under the facts in this case it became immaterial whether there were any trees there or not, as the question of the negligence of the parties was confined ultimately to that part of Second South street after Dederichs passed the trees in question, and had no reference to the trees shown in the photos at all.

Counsel cite authorities supporting the admission of these photos, but they are not in point under the facts in this case or the law stated in said authorities, for in them the *locus in quo* was shown, in the case at bar the photos do not show the *locus in quo*, i. e., the point of collision.

Some courts have admitted photos in evidence, while others have refused them for the reason that they do not show the truth, for, like an expert witness, they are always favorable to the side that takes, pays for, and uses them.

In the Tichborne trial, a photo was introduced to show a grotto, or rather a cave, and a very private cave at that, but when the Chief Justice and Justice Lush visited the spot upon which the camera that had produced the photo had been focused, they found not a cave or grotto, but a public highway only. Green Bag, vol. 5, p. 61.

Mr. Irving Browne, in an article in volume 5 of the

Green Bag, page 62, says that "Photographs can and do lie and be bad enough to bring a blush to the cheek of the worthiest disciple of Ananias." Mr. Browne does not say that all photos do not show the true status of the view presented, but says that by using lenses of different angles almost any picture desired can be produced, so that it will represent or misrepresent the scene at the will of the operating artist. There is no contention on our part that these views do not correctly represent what they purport to, as of date of April 6, 1895, but we do contend that they do not represent the situation on October 1, 1891, and that there is no evidence that shows that they do. Consequently they were inadmissible in evidence.

Counsel say that they were admissible for this reason: that they would show the negligence of plaintiff at the time of the collision, or just before. We ask, why? When they do not show the point of collision, nor within seventy-five feet of it. Then we ask again, can it be said they were competent for this reason? Surely it will not be seriously contended by counsel that they were or are. They were incompetent as evidence, for the reasons we have given. But if competent for any purpose the refusal to admit them is not reversible error, for the reason that the defendant was not deprived of any substantial right by the court's refusal to admit them as evidence. If any error was committed it was an immaterial error of not sufficient importance to reverse the case, as the error was, in any view taken of it, of a harmless nature.

Defendant, on page 9 of its brief, has cited eight authorities to support the proposition that the photos should have been admitted in evidence. As regards these citations, would say that not one of them supports its contention in fact or by inference, as the court will readily see by an inspection of them, for the reason that in each case cited, the photos were taken of the point of collision

or the point in question, and were proven to be correct; while in the case at bar, neither of these premises is correct or was proven by the evidence; hence these authorities are worthless in the case at bar as to the admissibility in evidence of the photographs in question.

MINER, J.:

This action was brought to recover damages arising from personal injuries claimed to have been occasioned by the appellant in negligently running its electric street cars on Second South street in Salt Lake City. The case was before this court on a former hearing, and the decision thereon is reported in 44 Pac. 649. Upon a retrial of the same case it appears from the testimony that on October 1, 1891, respondent was driving his horse and wagon south along Eighth East street across Second South, and after he had crossed the sidewalk and ditch going south towards the street railway track he discovered a street car coming west on the track, three or four hundred feet away. He drove on towards the track, not thinking the car was coming so rapidly, and believing there was plenty of time to cross, as the car was a considerable distance away. Plaintiff then hit his horse, which was upon the track, but the car came on without ringing the bell, sounding the gong, or applying the brakes, at the unusual rapid rate of 22 miles per hour, and ran into plaintiff's wagon, throwing plaintiff therefrom, and injuring him seriously, besides breaking his wagon. During the trial defendant offered in evidence three photographs, taken by the photographer who was a witness, showing the surroundings of the locality in question where the accident occurred, which photographs were shown to accurately represent the situation of the locality, as taken by the camera, and accurately printed from

the plates, but taken April 6, 1895. Plaintiff testified that he saw no difference in the condition in the trees, as shown in the photographs, from what they were at the time he drove across the track, and that the situation was the same as shown on the photographs that it was at the time of the accident. To the admission of these photographs in evidence the plaintiff objected. They were excluded by the court, and an exception taken. These photographs exhibited the surface condition of the streets, buildings, trees, cars, railroad track, poles, and distances, and would, no doubt, carry to the minds of the jury a better image of the locality of the accident and its surroundings, concerning which testimony was offered, than any oral description. Their accuracy as a faithful representation of the locality was shown as compared to the time of the accident. We think it must be deemed to be established that photographic scenes are admissible in evidence as appropriate aids to the jury in applying the evidence, whether it relates to persons, things, or places. It is a well-established rule, applied in every-day practice in courts, that diagrams and maps illustrating the scenes of a transaction, and the relative location of objects, if proved to be correct, are admissible in evidence, in order to enable the court or jury to understand and apply the established facts to the particular case. And it is difficult to see why a plain picture or representation produced by the art of photography is not admissible on like principles, if verified as a correct representation of the locality. If any difference had arisen concerning the photographs being taken at a different season of the year, it could have been explained. The general current of authority supports the admissibility of this class of evidence. 2 Rice, Ev. p. 1169-1172; 1 Greenl. Ev. § 92, note; *Alberti v. Railroad Co.*, 118 N. Y. 77; *Dyson v. Railroad Co.*, 57 Conn. 9; *Archer v.*

*Railroad Co.*, 106 N. Y. 589; *People v. Buddensieck*, 103 N. Y. 487; *Com. v. Robertson*, 162 Mass. 90; *State v. O'Reilly* (Mo. Sup.) 29 S. W. 577; *Nies v. Broadhead*, 27 N. Y. Supp. 52; *Stott v. Railway Co.* (Super. N. Y.) 21 N. Y. Supp. 630.

We think the testimony offered was admissible, and that the court erred in rejecting it. As this question disposes of the case, we do not deem it necessary to discuss the other questions presented. The judgment of the court below is set aside and vacated, and a new trial granted.

ZANE, C. J., and BARTCH, J., concur.

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SALT LAKE COUNTY, APPELLANT, *v.* MORGAN  
RICHARDS, RESPONDENT.

JURY FEES IN CIVIL CASES.

The state is not required to pay mileage and attendance of jurors in civil cases. Section 166, p. 571, Sess. Laws 1896, so far as it provides for an itemized statement "for mileage and attendance of grand jurors, for mileage and attendance of petit jurors engaged in the trial of cases in the district courts, and for mileage and attendance of witnesses summoned by or on behalf of the state in criminal cases in the district court," must be governed in its interpretation by subdivision 5, § 94, p. 548, Sess. Laws 1896; subd. 7, § 118, p. 555, Id.; subd. 4, § 165, p. 571, Id.; and section 151, p. 567, Id.

(No. 748. Decided Oct. 9, 1896.)

Appeal from the Third district court, Salt Lake county.  
Hon. John A. Street, *Judge*.

Petition by Salt Lake county for *mandamus* to compel Morgan Richards, State Auditor, to issue warrants for the payment of mileage and attendance of jurors in civil cases. From a judgment denying the writ, petitioner appeals. *Affirmed*.

C. D. Whittemore, County Attorney, for appellant.

A. C. Bishop, Attorney General, for respondent.

No briefs were filed in this case.

ZANE, C. J.:

The plaintiff, Salt Lake county, presented to the district court its petition against the defendant, duly verified, alleging that the clerk of that court and the county attorney had duly issued their certificates for mileage and attendance of grand and petit jurors; that such certificates amounted to \$5,425.60. These certificates included the mileage and attendance of petit jurors between January 4 and June 5, 1896, in civil as well as criminal cases, without indicating how much was due in either. The petition also alleged that the county treasurer and county auditor had made their statements, under oath, for that amount, and that the State Auditor had refused to issue a warrant on the State Treasurer for the same. The petition contained a prayer for a writ of *mandamus* compelling him to issue such warrant. The defendant demurred to the petition, because it did not state how much was due for mileage and attendance of jurors in criminal cases and how much in civil cases. The court below sustained the demurrer, and dismissed the suit, the plaintiff having elected to stand on its petition.



From this judgment of dismissal the plaintiff has appealed to this court, and assigns the ruling of the court upon the demurrer as error. Is the state required to pay mileage and attendance of jurors in civil cases? is the question presented for our consideration and decision. The plaintiff relies upon section 166 of "An act to establish a uniform system of county government," approved April 14, 1896 (Sess. Laws 1896, p. 571), as follows: "At such times as the board of county commissioners may designate, it shall be the duty of the county treasurer and the county auditor of each county to prepare in duplicate and verify under oath a full and complete itemized statement of all certificates issued by the clerk of the district court and county attorney since the date of the last statement (or, in case no former statement has been made, then since January 4th, 1896), for mileage and attendance of grand jurors, for mileage and attendance of petit jurors engaged in the trial of cases in the district court, and for mileage and attendance of witnesses summoned by or on behalf of the state in criminal cases in the district court; also a statement for all warrants drawn for salaries of the county attorney, the county treasurer, the county assessor; such statement shall set forth in detail the number of certificate or warrant, the date of same, the name of the person or persons in whose favor issued, the nature of the service rendered, and such other information as may be necessary.

One of such statements shall be transmitted to the State Auditor, and the other shall be filed in the office of the county clerk. Upon the receipt of said statement by the State Auditor, he shall, unless he find the same to be incorrect, draw his warrant in favor of the county treasurer upon the State Treasurer for the whole amount of said juror and witness certificates, as shown by said statement, and for one-half of the whole amount of said

warrants shown in said statement, and shall transmit the same to the county treasurer. The county treasurer shall hold the funds so drawn from the state treasury upon the warrant aforesaid as a separate fund for the redemption of the juror and witness certificates and for the part payment of the warrants, set forth in the statement above described." This section makes it the duty of the county treasurer and the county auditor to prepare in duplicate an itemized statement of all certificates issued by the clerk of the district court and county attorney for mileage and attendance of grand jurors, for mileage and attendance of petit jurors, and for mileage and attendance of witnesses summoned by or on behalf of the state in criminal cases. The statement should embrace only such certificates as may have been issued by the clerk and county attorney. If the mileage and attendance of jurors in civil cases should not be embraced in those certificates, such mileage and attendance should not be included by the county treasurer and county auditor in their itemized statement. It is upon this statement the State Auditor draws his warrant upon the treasurer. Therefore it is necessary to ascertain the mileage and attendance of petit jurors required to be embraced in the certificate of the district clerk and county attorney. Subdivision 5 of section 94 of the above mentioned act is as follows: "As clerk of the district court he shall issue a certificate of the attendance and mileage of all jurors and of witnesses in criminal cases." A reasonable construction of this language limits the mileage and attendance of jurors and witnesses to criminal cases. It limits the certificate of the clerk to the mileage and attendance of jurors in criminal cases, as it does the mileage and attendance of witnesses. Subdivision 7 of section 118 of the same act, requiring the approval and signature

of the county attorney, is to the same effect, to wit: "He shall examine and when approved by him, attach his approval and signature to the certificate of attendance and mileage of all jurors and of witnesses in criminal cases issued by the county clerk." This provision requires the county attorney to examine the certificates of the clerk of mileage and attendance of witnesses and jurors in criminal cases, and, if he finds it to be correct, to approve it, and attach his signature to it. These officers have no right to include in this certificate the mileage and attendance of jurors or witnesses in civil cases. Nor are the county treasurer and county auditor authorized to include in their statement required in section 166, above quoted, to be presented to the State Auditor, upon which he is required to draw his warrant on the State Treasurer, mileage and attendance of jurors or witnesses in civil cases. Section 165,—immediately preceding the one requiring the county treasurer and county auditor to make their statement upon which the State Auditor draws his warrant upon the State Treasurer,—declares that "the sums required by law to be paid to jurors in civil cases" shall be a county charge. Why require sums that are a county charge to be certified to the state for payment. Section 151 of the same act makes it the duty of either party to any civil cause pending in the district court desiring a jury trial to notify the clerk in writing thereof before the cause is set for trial, or such other time as the court shall direct, and at the time of such notice to deposit with the clerk the sum of five dollars, and the clerk is required to deposit the same in the county treasury. Why require this jury fee to be paid into the county treasury if the state is to pay the fee of the jurors? The minutes of the clerk should show the time jurors serve in the trial of civil causes, also the time

in criminal causes; and the mileage should be divided between the two classes of service proportionately to the time occupied by each respectively. The clerk should give the juror a statement of his attendance in the trial of civil cases, and of his mileage, that he may present it to the proper county officer or officers to be audited and paid. We cannot assume that the legislature would have made the sums required by law to be paid to jurors in civil cases a county charge, and would have required jury fees collected of litigants paid into the county treasury, if it had intended the state should pay such mileage and attendance. We hold that the county should pay jurors their mileage and attendance in civil cases, and that the state is not liable therefor, and that the court below did not err in sustaining defendant's demurrer to plaintiff's petition. The judgment of the court below is affirmed.

BARTCH and MINER, JJ., concur.

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WILLARD PEHRSON, RESPONDENT, v. CITY COUNCIL OF THE CITY OF EPHRAIM, APPELLANT.

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15	12

LIQUOR LICENSE—REVOCATION.

1. Under chapter 52, p. 57, Sess. Laws 1893, defendant issued plaintiff a license to retail liquors, and after a quarter's license had been paid, and within a month after its issuance, revoked the same without previously having preferred charges against the plaintiff, or having cited him to appear and show cause why the license should not be revoked; the plaintiff having, however, been notified by the mayor of the city of the inten-

tion of the defendant to consider the matter of his license, and that he might attend the meeting of the city council, and be heard, if he desired. *Held*, that the revocation, without preferring charges against the licensee and giving him an opportunity to be heard, was unlawful and void.

2. Where a thing is to be done for cause, in the exercise of discretion, the law intends a sound discretion, and that the action be based on the merits of the case, as shown by the facts in relation to it.

(No. 714. Decided Oct. 5, 1896.)

Appeal from the district court, Seventh judicial district. Hon. Jacob Johnson, *Judge*.

*Certiorari* by Willard Pehrson against the city council of the city of Ephraim to review the revocation of a liquor license.

From a judgment for plaintiff, defendant appeals. *Affirmed*.

*L. R. Rhodes*, for appellant.

The only limit placed upon the council is, that as a precedent to revocation, it must be the judgment of the council that it would be necessary for the peace and good order. *Tredl v. Carstenson et al.*, 61 Ia. 334; *Smith v. Board Supervisors*, 30 Ia. 531; *Board Supervisors v. Midland Co.*, 27 Mich. 165; *People ex rel. Kent v. Board Fire Commissioners*, 10 N. Y. 82; *In re Salina County Subscription Case*, 100 Am. Dec. 337; Black on Intoxicating Liquors, sec. 105; *In re Carlson*, 18 Atl. Rep. 8; *Redden v. License Comm'rs*, 21 Atl. Rep. 1020.

It was a mere license subject to the law, not a vested right. Black on Intoxicating Liquors, sec. 51.

*Wm. K. Reid*, for respondent.

Sufficient cause must be shown. Black on Intoxicating Liquors, p. 234; *United States v. Douglass*, 8 Mackey 99; *Schlaudecker v. Marshall*, 72 Pa. 200; *People v. Symonds*, 4 Wis. 6.

BARTCH, J.:

In this case the plaintiff made an application for the issuance of a writ of *certiorari* to review the action of defendant by which it revoked the license of the plaintiff to sell liquors in the city of Ephraim. The court issued the writ, and after return made, upon hearing, adjudged the action of the defendant in revoking the license to be void, and thereupon the defendant appealed. It appears from the record that on February 24, 1896, the appellant granted to the respondent a retail liquor license for the period of three months, commencing on the 11th day of March following; that he paid into the city treasury for said license the sum of \$150; that under said license the respondent carried on the business of a retail liquor dealer from the 11th to the 21st day of March, 1896, when the license was declared revoked, without having previously preferred charges against the respondent, or having cited him to appear and show cause why the license should not be revoked,—the respondent, however, having been notified by the mayor of the city of the intention of the appellant to consider the matter of his license, and that he might attend the meeting of the city council and be heard, if he so desired.

Counsel for the appellant insists that the action of the city council was authorized by the law, and that the court erred in its judgment annulling said action. The statute law material in the decision of this case is found in chapter 52, p. 57, Sess. Laws 1892. Section 1, which is an amendment to section 2158, Comp. Laws Utah 1888, referring to the granting of licenses for the sale of liq-

uors, among other things provides "that any application for such license may be refused for good cause, in the discretion of the city council or county court. \* \* \*" Section 2, which is an amendment to section 2169, Comp. Laws Utah 1888, relating to revocation of liquor licenses, provides that "the county court or the city council may revoke any license granted to the keeper of saloons, tippling houses, dram shops, or for the selling or giving away of any intoxicating drink or malt liquors, within the city or county, whenever, in the judgment of the court or city council, such action may be necessary to the peace and good order of any precinct in the county or of the city." The sections amended by the act of 1892 are both portions of the general law relating to intoxicating liquors. Both are applicable to each city and county in the state, and must be considered in determining the legislative intent respecting the revocation of liquor licenses. It will be noticed that under the first section of the act of 1892 the city council or county court may, in their discretion, for good cause, refuse to grant such a license to any applicant, but it appears that they have no power to arbitrarily deny an application.

The statute invests in such court and council a legal discretion, which must be exercised in a reasonable, and not a wilful, manner, and only for cause can a license be withheld. Therefore the action by which a license is granted or withheld must be based upon such relevant facts as may come before the body which is called upon to act. If, then, those sitting to administer the law, upon lawful application therefor, can only refuse a license for cause, and must determine each case upon relevant facts, and exercise a sound discretion, can they revoke such license at mere will? Counsel for the appellant insists that section 2, above quoted, confers such power. We do not think this position tenable. Under such a con-

struction the two sections would be in conflict with each other, or, rather, the effect and operation of the one would avoid and annul the effect and operation of the other, because, under the first section, upon application therefor, unless good cause existed for refusing, the license would have to be granted, and under the second it might be immediately revoked without cause. This would be unreasonable. The two sections must be construed together, and effect given to both, if possible; and, when the second section is considered with the first, its clear meaning is that the county court or city council may revoke any such license whenever, in their judgment, such revocation becomes necessary to the peace and good order of the public, but their judgment must be based on the existence of such relevant facts as show some cause and necessity for their action. The sale of intoxicating liquors as a beverage is one of many things things which affect the public morals, and whether licenses should be granted, and how they should be granted and revoked, are legislative questions. Those who sit to administer the law should administer it fairly. Where a thing is to be done for cause, in the exercise of discretion, the law intends a sound discretion, and that the action be based upon the merits of the case as shown by the facts in relation to it. The statute law under consideration vests in the county court and city council a large discretion, which should be exercised primarily for the public good, and secondarily for private interests. It is admitted in this case that the license was regularly granted according to law, and there is nothing to show that the respondent had in fact violated the law or the city ordinances. Nor does the record contain any facts or show any cause which were sufficient to authorize the revocation. The action of the council was therefore with-



out its jurisdiction and void, and the district court committed no error in setting it aside. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

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PEOPLE, RESPONDENT, v. THOMAS McCUNE,  
APPELLANT.

VILLAGE—WHAT CONSTITUTES.

Where it appeared from the evidence that a settlement consisted of 14 families, each family containing about 5 persons; that these reside along a stream, the distance from one extreme end of the settlement to the other being about two miles and a half, some residing within 40 rods of each other, and others being distant about a mile or more; that their chief occupation was farming; that the settlement contained a school district, a district school, and a post office; and that the nearest settlement to the north was distant about 15 miles, to the west about 12, and to the south about 6 miles,—it was not error in the court to instruct the jury that as a matter of law such a settlement was a village, within the meaning of the statute (chapter 63, p. 70, Sess. Laws 1892).

(No. 704. Decided Oct. 5, 1896.)

Appeal from the district court, Sixth judicial district,  
Hon. W. M. McCarty, *Judge*.

Thomas McCune was convicted of befouling a stream,  
and appeals. *Affirmed*.

*J. W. N. Whitecotton*, for appellant.

*A. C. Bishop*, Attorney General and *Benner X. Smith*, of counsel, for respondent.

BARTCH, J.:

This is a criminal prosecution, in which the defendant was charged with the offense of befouling the water of a certain stream, by unlawfully establishing and maintaining a camp or bedding place on the banks thereof for a large number of sheep, the waters of said stream being used by the inhabitants of a settlement called "Plateau" for domestic purposes. He was tried before a justice of the peace, convicted, and sentenced to pay a fine, and then appealed to the district court, where he was convicted, and sentenced to pay a fine and costs of prosecution. Thereupon he appealed to this court..

The main point relied upon by the appellant for a reversal of the judgment is that the court erred in instructing the jury that, as matter of law, the settlement called "Plateau," near which the offense was charged to have been committed, is a village, under chapter 63, p. 70, Sess. Laws 1892, which is an amendment to section 2264, Comp. Laws Utah, 1888. Section 5 of said chapter was enacted as a subdivision to section 2264, and made it unlawful "to establish and maintain any corral, camp or bedding place for the purpose of herding, holding or keeping any cattle, horses or sheep, within seven miles of any city, town or village, where the refuse or filth from said corral, camp or bedding place, will naturally find its way into any stream of water used by the inhabitants of any city, town or village for domestic purposes." It is insisted by counsel for the appellant that Plateau is not such an assemblage of houses as to constitute it a village, within the meaning of this statute. It appears from the

evidence, among other things, that Plateau is a settlement in Sevier county, Utah, consisting of 14 families, each family on an average containing about 5 persons; that these families reside along a stream called "Otter Creek," the distance from one extreme end of the settlement to the other being about two miles and a half, some residing within about 40 rods of each other, and others being distant about a mile or more; that their chief occupation is farming; that the settlement contains a school district, district school, and a postoffice; and that the nearest settlement to the north is distant about 15 miles, to the west about 12, and south about 6 miles. We think the evidence was sufficient to authorize the court to instruct the jury that, as a matter of law, the settlement of Plateau is a village, within the meaning of the statute. From an examination of the act, which is amended by the section above quoted, it seems clear that by the use of the word "village" the intent of the legislature was to include such settlements as the one in question, and there appears to be no reason why the people of such a settlement, who are using the water of a stream for domestic purposes, should not have extended to them the protection which the law affords. Their health and comfort demand equal protection with those who live in larger and more densely settled villages, towns, and cities. It is a wise and beneficial law, calculated to promote the comfort and protect the health and lives of the inhabitants, and its operation and application must not be unreasonably abridged by judicial construction.

The contention, on the part of the appellant, that the venue was not proven, we think is not well taken. There is sufficient evidence on this point to show that the offense was committed in Sevier county, and hence the court had jurisdiction.

It is also insisted that the court erred in its instructions

to the jury as to what constituted an establishment and maintenance of a camp or bedding place for sheep, under the statute, but a careful perusal of the instructions reveals no reversible error. We do not deem it necessary to discuss any other question presented, because the record appears to contain no error which would warrant a reversal of the case. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

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**NORTH POINT CONSOLIDATED IRRIGATION COMPANY, RESPONDENT, v. THE UTAH AND SALT LAKE CANAL COMPANY ET AL., APPELLANTS.**

**APPEAL—ORDER FOR INJUNCTION PENDENTE LITE—FINALITY—CONSTITUTIONAL LAW—VESTED RIGHTS.**

1. In an action to restrain defendant from discharging certain waters upon the lands of plaintiff, the district court granted an injunction *pendente lite*. Defendant appealed from the order granting the injunction, and respondent moved to dismiss the appeal on the ground that it was not a final judgment, and therefore not warranted by the constitution. *Held*, that the terms, "in other cases the supreme court shall have appellate jurisdiction only," as used in section 4, art. 8, Const., has reference to appeals from all final judgments of the district court as used in section 9, art. 8, Const., and no other.
2. A final judgment is a judgment that disposes of the case as to all parties, and finally disposes of the subject-matter of the litigation on the merits of the case.
3. While there is no express declaration that appeals will not lie from judgments other than final judgments, yet the court

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14	278
15	172
15	268
15	367

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18	242
14	155
20	389
20	463
20	472

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22	459
22	460

14	155
22	532

14	155
30	451

14	155
32	20

holds that the affirmative declaration, as used in the section, that "from all final judgments of the district court there shall be a right of appeal to the supreme court," in connection with the language used as to other appeals, manifests the intent of the framers of the constitution to except from the appellate jurisdiction of the supreme court appeals from the district courts other than appeals from final judgments. This intention and interpretation is founded on the manifest intent of the framers of the constitution in framing section 9, and upon the general rules of construction.

4. The expression of one thing in the constitution or statute usually implies the necessary exclusion of things not expressed, and the people, in framing section 9, intended to deny the right of appeal to the supreme court in all other cases, although no express term of negation was used, and so much of subdivision 3, § 3635, Comp. Laws Utah 1888, authorizing appeals from orders granting an injunction, is abrogated and annulled by section 9, art. 8, Const.
5. The policy of the law of the several states and of the United States is to prevent unnecessary appeals. The interests of litigants require that appeals shall not prematurely be brought to the appellate court by piecemeal, and the litigants harassed by useless expense and delay of their rights. A party against whom an interlocutory order is made can have all his wrongs redressed and his rights protected by an appeal from a final judgment, where all the alleged errors may be reviewed at one hearing in the supreme court.
6. An appeal from an order *pendente lite* is not an appeal from a final judgment.
7. A citizen has no vested right in statutory provisions and exemptions. A statutory right to have cases reviewed on appeal may be taken away by a repeal of the statute, even as to cases which have been previously appealed. The constitution has taken away the right of appeal from an interlocutory order granting a temporary injunction.

(No. 740. Decided Oct. 29, 1896.)

Appeal from the Third judicial district court. Hon. John A. Street, *Judge*.

Action by the North Point Consolidated Irrigation Company against the Utah and Salt Lake Canal Company and others. From an order granting a temporary injunction, defendants appeal. Motion to dismiss for want of jurisdiction. *Granted.*

*Richards & Richards*, for appellants:

On a motion for a re-hearing, appellants filed the brief from which the following is taken:

RULES FOR THE CONSTRUCTION OF STATE CONSTITUTIONS.

The legislature of a state has jurisdiction on all subjects on which its legislation is not prohibited by the constitution. Its powers are inherent, not being derived from the constitution, but restricted by it. Black on Interpretation of Laws, p. 25; Black's Constitutional Law, 260; *Weister v. Hade*, 52 Pa. St. 474; Endlich on Interpretation of Statutes, sec. 535.

A state constitution should be liberally construed on broad general lines and not interpreted on narrow or technical principles. Black on Interpretation of Laws, p. 14; Story on the Constitution, sec. 413; Cooley's Constitutional Limitations, sec. 59; Sutherland on Statutory Construction, sec. 248-49-50.

In case of ambiguity, the whole constitution is to be examined in order to determine the meaning of any part, and the construction must give effect to the entire instrument. Black on Interpretation of Laws, p. 17; Cooley's Constitutional Limitations, sec. 58; Sutherland on Statutory Construction, sec. 239.

The constitution must be construed in the light of the statute and common law previously existing in the state. There is always a presumption against an unnecessary change of laws, and when the constitution makes a

change it is not to be extended by construction beyond the terms of the constitution. Black on Interpretation of Laws, pp. 19-110; Cooley's Constitutional Limitations, sec. 61; *Brown v. Field*, 4 Mich. 322; *Costigan v. Bond*, 65 Md. 122; Endlich on Interpretation of Statutes, sec. 520; Sutherland on Statutory Construction, secs. 290, 400.

The maxim, "*expressio unius est exclusio alterius*," is not an universal rule. "The true rule is, in order to ascertain how far an affirmative or negative provision includes or implies others, that we must look to the nature of the provision, the subject matter, the objects, and the scope of the instrument." Potter's Dwaris on Statutes and Constitutions, pp. 674-5; Story on the Constitution, sec. 488-9, 453; *Cohens v. Virginia*, 6 Wheat. 401; Federalist No. 83; Endlich on Interpretation of Statutes, sec. 533; Sutherland on Statutory Construction, sec. 325.

The natural import of a single clause, is not to be narrowed so as to exclude implied powers resulting from its character, simply because there is another clause which enumerates certain powers within its scope. It cannot be assumed that the affirmative specification excludes all other implications. Story on the Constitution, sec. 449; Potter's Dwaris on Statutes and Constitutions, p. 675.

"It is a familiar rule that a statute in contravention or derogation of the common law ought not to be extended by construction. And there is always a presumption against an unnecessary change of laws. Accordingly it has been held that when a new constitution makes a change in the pre-existing law, whether common law or statutory, the change is not to be extended by construction beyond *the very terms of the constitution*." Black on Interpretation of Laws, p. 19; Black on Interpretation of Laws, p. 110.

The respondent seems to rely entirely upon the maxim, *expressio unius est exclusio alterius*, and claims that the

enumeration in section 9, article VIII, excludes jurisdiction in all other cases. The only authorities cited by respondent are the cases of the *United States v. Arredondo*, 6 Peters 725, and *Ex Parte Attorney General*, 1 Cal. 85. Neither of these cases is in point. In the case first cited, while construing an act of congress, the court declared that this is an universal maxim in the construction of statutes. *But the rule is not universal in the construction of constitutions.* In the California case the court refused to take original jurisdiction in a case requiring a jury, and held that the constitution did not contemplate the exercise of such jurisdiction by the highest appellate court of the state. *The true rule is, in order to ascertain how far our affirmative or negative provision includes or implies others, that we must look to the nature of the provision, the subject matter, the objects, and the scope of the instrument. These, and these only, can properly determine the rule of construction.*" Story on the Constitution, sec. 448; Endlich on Interpretation of Statutes, sec. 507.

*Loofbourou & Kahn, E. W. Taylor, and John M. Zane*, for respondent.

No brief was filed on motion for rehearing.

MINER, J.:

Plaintiff filed its complaint, and obtained an order to show cause why an injunction should not be issued against the defendants restraining them from longer discharging the waste and befouled waters of a certain artificial drain ditch from Decker's Lake into the surplus water canal, and in and upon the lands of the plaintiff. Upon a hearing of this order for temporary injunction the court granted an injunction *pendente lite*, and on the 8th day of June, 1896, the defendants appealed from the order granting such injunction. Respondent now moves



to dismiss the appeal, on the ground that no appeal lies to this court from an order granting an injunction *pendente lite*, and for the further reason that such order is not a final judgment under section 9, article 8, of the constitution of this state, and that no appeal lies except from a final judgment.

Section 4 of article 8 of the constitution of this state reads as follows: "The supreme court shall have original jurisdiction to issue writs of *mandamus*, *certiorari*, prohibition, *quo warranto*, and *habeas corpus*. Each of the justices shall have power to issue writs of *habeas corpus*, to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the supreme court, or before any district court or judge thereof in the state. In other cases the supreme court shall have appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction. The supreme court shall hold at least three terms every year, and shall sit at the capital of the state." Section 9 of article 8 reads as follows: "From all final judgments of the district courts there shall be a right of appeal to the supreme court. The appeal shall be upon the record made in the court below, and under such regulation as may be provided by law. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the court in the administration of decedent estates, and in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the district courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the district courts on such appeals shall be final, except

in cases involving the validity or constitutionality of a statute."

Under section 4, the supreme court is given original jurisdiction to issue writs of *mandamus*, *certiorari*, prohibition, *quo warranto*, and *habeas corpus*. In these cases named it is clear the supreme court has original jurisdiction. This language follows: "In other cases the supreme court shall have appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction." The question, in what other cases has the supreme court appellate jurisdiction? is answered by section 9: "From all final judgments of the district courts there shall be a right of appeal to the supreme court. Appeals shall also lie from the final orders and decrees of the court in the administration of decedent estates, and in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgments of justices of the peace in civil and criminal cases, to the district court on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the district court on such appeal shall be final, except in cases involving the validity or constitutionality of a statute." The term in "other cases" cannot mean in all other cases, because, as is seen in section 9, the decision of the district court is made final and conclusive in appeals thereto from justices of the peace, except in stated cases. The legislature is given power to provide by law concerning appeals in probate cases, but no such power is conferred upon the legislature concerning final appeals from the district court. It is clear that the "other cases" referred to in section 4 has reference to those appeals from final judgments referred to in section 9, and no other.

This brings us to the further consideration of section 9.

Whether this court has jurisdiction of this appeal depends upon the construction given that section. If the constitution gives a mere guaranty of the right of appeal from final judgments of the district courts, the power is reserved in the legislature to give a right of appeal in other cases. But, if the constitution gives not only a guaranty of the right to appeal from final judgments, but by implication a denial of the right of appeal in other cases, then the court has no jurisdiction of the appeal in this case. "A constitution is not to be interpreted on narrow or technical principles, but liberally, and on broad, general lines, in order that it may accomplish the object of its establishment, and carry out the great principles of the government. The words are not to be stretched beyond their fair sense, but within that range the rule of interpretation must be taken which best follows out the apparent intention of its framers." Black, *Interp. Laws*, p. 13. "One part may qualify another so as to restrict its operation or apply it otherwise than the natural construction would require if it stood alone by itself. But one part is not to be allowed to defeat another if by any reasonable construction the two can be made to stand together. In interpreting clauses we must presume that words have been employed in their natural and ordinary meaning." Cooley, *Const. Lim.*, p. 72. "Under every constitution the doctrine of implication must be resorted to in order to carry out the general grants of power. So every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision, as strongly as if a negative was expressed in every sentence." That which is implied by statute is as much a part of it as what is expressed. *Id.*, pp. 78-105; *Suth. St. Const.* § 334. The maxim, "*Expressio unius est exclusio alterius*," is usually

applied to determine the intention of the lawmaker where it is not otherwise expressed, and is applicable to constitutional or statutory provisions which grant originally a power or right. When a statute defining an offense designates but one class of persons as subject to its penalties, all other persons are deemed to be excluded. As a general rule, the expression of one thing in a constitution or statute excludes all others. So specific provisions, relating to particular subjects, must govern in relation to that subject, as against general provisions in other parts of the law which might otherwise be broad enough to include it. Where a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others, and the natural inference follows that it is not intended to be general. A national bank being granted the power to loan money on personal security, such banks are held precluded from loaning on real estate mortgages. *Suth. St. Const.* §§ 325-327; *Fowler v. Scully*, 72 Pa. St. 456.

The appellate jurisdiction of the federal supreme court is conferred by the constitution of the United States "with such exceptions, and under such regulations, as congress may make." Article 3, § 2. Therefore acts of congress affirming such jurisdiction have always been construed as excepting from it all cases not expressly described and provided for. *Ex parte McCardle*, 7 Wall. 506; *Durousseau v. U. S.*, 6 Cranch 312; *Suth. St. Const.* § 327. As explained in *Durousseau v. U. S.*, 6 Cranch 312, the court said: "Thus a writ of error to the judgment of a circuit court, where the matter in controversy exceeds the value of \$2,000. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in

the circuits where the matter in controversy is of less value, and implies negative words." So, as a general rule, an affirmative grant of power will imply an exclusion of all others. Potter's Dwar. St. pp. 674, 675. So, where technical words are used in a constitution, the technical meaning is to be applied to them, unless it is repelled by the context. 1 Story, Const. § 453. In construing constitutions, the doctrine that what is implied is as much a part of the instrument as what is expressed is a necessity by reason of the inherent inability to put all private power into words. *Rhode Island v. Massachusetts*, 12 Pet. 657; *Ex parte Yarbrough*, 110 U. S. 651.

Under the light of these general principles and decisions, what is the meaning of the term used in the constitution, "From all final judgments of the district courts, there shall be a right of appeal to the supreme court," when viewed in connection with the balance of the section? It will be noticed that the word "final," or "final judgment" is used in connection with appeals from the district courts, appeals from the probate courts, and appeals from justices' courts; while a right of appeal from all final judgments to the district court is expressly granted. Yet the same section expressly grants the right of appeal from the final orders and decrees of the court in decedents' estates, and limits the right of appeal from final judgments in justices' courts to the district courts. The word "final" or "final judgment" has a plain meaning. A judgment, to be final, must dispose of the case as to all the parties, and finally dispose of the subject-matter of the litigation on the merits of the case. *Champ v. Kendrick*, (Ind. Sup.) 30 N. E. 635. Bouvier defines a final judgment as used in opposition to interlocutory as "A final judgment is a judgment which ends the controversy between the parties litigant." "The general rule recognized by the

courts of the United States and by the courts of most, if not all of the states, is that no judgment or decree will be regarded as final, within the meaning of the statutes in reference to appeals, unless all the issues of law and of fact necessary to be determined were determined, and the case completely disposed of, so far as the court had power to dispose of it." Freem. Judgm. § 34. If appeals can be taken from interlocutory orders and judgments not final, from the district court to the supreme court, it follows that for the same reason appeals may be taken from rulings and decisions not final, from a justice court to a district court, and from the district court to the supreme court. It would be just as reasonable to allow an appeal from an order overruling a demurrer or granting a motion for a new trial, before final judgment, from a justice of the peace, as to allow an appeal from an order granting a temporary injunction *pendente lite* from the district court to the supreme court. In neither case would the appeal be from a final judgment. Yet the constitution is as explicit in allowing appeals in one case from final judgments as in the other. In each the right of appeal is from a final judgment. If the intention was to guaranty the right of appeal from a final judgment, and confer upon the legislature implied power to authorize appeals in all other cases from the district courts, then the same guaranty with implied power is also retained, and to be applied to justices' courts as well as to courts in the administration of estates. It would be no answer to this that the legislature had previously conferred the power in the one case and withheld it in the other. If the power exists in the legislature, the right could be conferred upon justices' courts at any time. It is apparent that such an unfortunate construction or implication was not contemplated nor intended. It would be presuming too much to say that the framers of the constitution were fearful

that the legislature would enact laws preventing appeals from final judgments, and that, therefore, this provision was inserted, giving a guaranty of the right of appeal from such judgments, thus leaving to the legislature the right to enact laws allowing appeals from interlocutory orders. Especially is this so when we consider the fact that nearly every state in the Union allows appeals from final judgment, and restricts or prohibits appeals from interlocutory orders as being against the policy of the law. The framers of the constitution could not have anticipated that the legislature would do an unreasonable thing, and thus take away the right of appeal from a final judgment, when that right has grown to be almost inherent, and yet use words sufficient to authorize it to do that which in most states is considered questionable, and by eminent law writers to be against the policy of the law.

In granting the right of appeal from all final judgments the people intended to grant the right of appeal from all final judgments only. The supreme court, being a creature of the constitution, has only such powers as are therein conferred upon it. The only jurisdiction that is conferred by the constitution upon the supreme court in appeal cases is appeals from final judgments. There is no express declaration that appeals will not lie from judgments other than final judgments. But the court considers the affirmative declaration, as used in the section, that "from all final judgments of the district court, there shall be a right of appeal to the supreme court," as manifesting the intent of the framers of the constitution to except from the appellate jurisdiction of the supreme court appeals from the district courts, other than appeals from final judgments. This intention and implication is founded on the manifest intent of the framers of the constitution, and upon the general rules of construction that the expression of one

thing in the constitution implies the necessary exclusion of things not expressed. We are of the opinion that when the framers of section 9 used the terms "from all final judgments of the district court there shall be a right of appeal to the supreme court," they intended to deny the right of appeal to the supreme court in all other cases, although no express terms of negation were used, and that so much of subdivision 3 of section 3635, Comp. Laws Utah 1888, authorizing appeals from orders granting an injunction, is abrogated and annulled by this section of the constitution. *Durousseau v. U. S.*, 6 Cranch 307; *Ex parte Attorney General*, 1 Cal. 85; *Ex parte McCarrdie*, 7 Wall. 506; *U. S. v. Arredondo*, 6 Pet. 723; 725; *Suth. St. Const.* §§ 325-327; *Fowler v. Scully*, 72 Pa. St. 456; *Cooley, Const. Lim.* pp. 78-105; *Story, Const.* §§ 413-453; *State v. Hallock*, 14 Nev. 202; *Ex parte Vallandigham*, 1 Wall. 251; *Railroad Co. v. Grant*, 98 U. S. 401; *Page v. Allen*, 58 Pa. St. 338; *Barry v. Mercein*, 5 How. 103; *Potter's Dwar. St.* 674, 675.

The policy of the laws of the several states and of the United States is to prevent unnecessary appeals. It is not the policy of courts to review cases by piecemeal. The interests of litigants require that cases shall not be prematurely brought to the highest court. The errors complained of may be corrected in the court in which they originated; or the party injured by them might, notwithstanding the injury, have final judgment in his favor. If a judgment interlocutory in its nature were the subject of appeal, each of such judgments rendered in the case could be brought before the appellate court, and litigants harassed by useless delay and expense, and the courts burdened with unnecessary labor. *Freem. Judgm.* § 33. The reason of the rule is obvious. A party against whom an interlocutory order is made may have all his wrongs redressed and his rights protected upon a final hearing,



and therefore he has no ground of complaint. If these rights are not protected on a final hearing in the trial court, the error can be corrected on appeal from the final judgment.

We conclude that an appeal from an order *pendente lite* granting a temporary injunction is not an appeal from a final judgment, and that such an order is not a final judgment, from which an appeal will lie to this court, under section 8 of the constitution. *Artman v. Manufacturing Co.* (Neb.) 20 N. W. 873; *Baker v. White*, 92 U. S. 176; *Telegraph Co. v. Locke*, (Ind. Sup.) 7 N. E. 579; *Hume v. Bowie*, 148 U. S. 245; *Freem. Judgm.* § 34; *Bank v. Jenkins*, 109 Ill. 219; *Bostwick v. Brinkerhoff*, 106 U. S. 3; *Hill v. Railroad Co.*, 140 U. S. 52. See *Stewart v. Master-son*, 131 U. S. 151; *Walker v. Oliver*, 63 Ill. 200; *Brown v. Edgerton* (Neb.) 16 N. W. 474; *Tinly v. Martin*, 80 Ky. 463; *Truett v. Rains*, 17 S. C. 451; *Ray v. Northrup*, 55 Wis. 396; *Bolles v. Stockman*, 42 Ohio St. 445; *Dows v. Congdon*, 28 N. Y. 122.

It is contended that the appellants' right of appeal is guarantied under the statute. A citizen has no vested right in statutory provisions and exemptions. A statutory right to have cases reviewed on appeal may be taken away by a repeal of the statute, even as to cases which have been previously appealed. In this case the constitution has taken away the right of appeal from an interlocutory order granting the temporary injunction appealed from. *Cooley, Const. Lim.* pp. 471-473; *Railroad Co. v. Grant*, 98 U. S. 398; *Ex parte McCardle*, 7 Wall. 506. The appeal from the order granting the injunction is dismissed, with costs.

ZANE, C. J., concurs. BARTCH, J., disqualified to sit in the case.

M. EASTMAN, APPELLANT, v. A. R. GURREY,  
RESPONDENT.

APPEAL—ORDER VACATING JUDGMENT—FINALITY—CONSTITUTIONAL  
LAW—VESTED RIGHTS.

14	169
15	172
15	367
14	169
20	472
14	169
22	480
14	169
30	451

1. The plaintiff recovered judgment in an action of ejectment against defendant. The judgment, on motion for a new trial, was set aside and vacated, and a new trial granted. From the order setting aside and vacating the judgment, plaintiff appealed. Respondent moved to dismiss the appeal on the ground that the judgment not being final, it is not within the constitutional right of appeals. *Held*, affirming *North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 14 Utah 155, that, as the appeal was not from a final judgment of the district court, it is prohibited by implication under section 9, art. 8, Const., and by the application of the maxim, "*Inclusio unius est exclusio alterius*." The constitution has taken away the statutory right of appeal from the order vacating and setting aside the judgment appealed from. By using the terms, "from all final judgments of the district courts, there shall be a right of appeal to the supreme court," in connection with the balance of the section, the framers of that instrument intended to deny the right of appeal to the supreme court in all other cases arising under that clause, although no express term of negation was used.
2. The policy of the laws of the several states and of the United States is to prevent unnecessary appeals. Interests of litigants require that cases shall not be prematurely brought to the higher court, nor by piecemeal, and litigants harassed by useless delay and expense, and the courts burdened with unnecessary labor.
3. A citizen has no vested right in the statutory privilege or exemptions. A statutory right to have any particular question reviewed on appeal may be taken away by a repeal of the statute.

(No. 734. Decided Oct. 29, 1896.)

Appeal from the district court, Third judicial district.  
Hon. John A. Street, *Judge*.

Ejectment by M. Eastman against A. R. Gurrey. From an order vacating a judgment for plaintiff, plaintiff appeals. Respondent moves to dismiss the appeal on the ground that the order setting aside the judgment was not final. Appeal dismissed.

*C. S. Varian and Ricy H. Jones*, for appellant.

*T. Ellis Browne and Bennett, Harkness, Howat & Bradley*, for respondent.

MINER, J.:

It appears from the record in this case that the plaintiff recovered judgment in the district court in an action in ejectment against the defendant in February, 1896. This judgment was afterwards set aside and vacated, and a new trial granted, on motion of the defendant. The appellant appeals from the order vacating and setting aside the judgment. The respondent now moves to dismiss the appeal on the ground that no appeal lies to this court from an order vacating and setting aside the judgment, under section 9 of article 8 of the state constitution, and that such order was not a final judgment from which an appeal will lie to this court. The same principle is involved in this appeal as in that of *North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 14 Utah 155. That case involved the constitutional right of appeal from an order granting an injunction *pendente lite*. The decision in that case, on principle, is decisive of this. We shall therefore content ourselves with a reference to the reasoning in that case as applicable in this. This case, as that, involves the construction of sections 4 and 9 of article 8 of the constitution. Section 9 provides that, "From all

final judgments of the district courts, there shall be a right of appeal to the supreme court." Upon that subject this court said: "There is no express declaration that appeals will not lie from judgments other than final judgments, but the court considers the affirmative declaration used in the section as manifesting the intent of the framers of the constitution to except from the appellate jurisdiction of the supreme court all appeals other than appeals from a final judgment. This restriction and implication is founded on the manifest intent of the framers of the constitution, and upon the general rules of construction that the expression of one thing in the constitution implies the necessary exclusion of things not expressed. We are of the opinion that when the framers of section 9 used the terms, 'From all final judgments of the district courts, there shall be a right of appeal to the supreme court,' they intended to deny the right of appeal to the supreme court in all other cases arising under that clause, although no express term of negation was used." *Durousseau v. U. S.*, 6 Cranch 307; *Ex parte Attorney General*, 1 Cal. 85; *Ex parte McCardle*, 7 Wall. 506; *U. S. v. Arredondo*, 6 Pet. 723, 725; *Suth. St. Const.* §§ 325-327; *Fowler v. Scully*, 72 Pa. St. 456; *Cooley, Const. Lim.* pp. 78-105; *Story, Const.* §§ 413, 453; *State v. Hallock*, 14 Nev. 202; *Ex parte Vallandigham*, 1 Wall. 251; *Railroad Co. v. Grant*, 98 U. S. 401. We are of the opinion that an appeal from an order vacating and setting aside a judgment is not an appeal from a final judgment and that such an order is not a final judgment from which an appeal will lie to this court under section 9 of article 8 of the constitution. *Artman v. Manufacturing Co.*, (Neb.) 20 N. W. 873; *Baker v. White*, 92 U. S. 176; *Telegraph Co. v. Locke*, (Ind. Sup.) 7 N. E. 579; *Hume v. Bowie*, 148 U. S. 245; *Freem. Judgm.* § 34; *Bank v. Jenkins*, 109 Ill. 219; *Bostwick v. Brinkerhoff*, 106 U. S. 3; *Hill v. Railroad Co.*,

140 U. S. 52; 2 Enc. Pl. & Prac. p. 53; *Tinly v. Martin*, 80 Ky. 463; *Holcombe v. McKusick*, 20 How. 552; *Brown v. Edgerton*, (Neb.) 16 N. W. 474; *Walker v. Oliver*, 63 Ill. 200; *Truett v. Rains*, 17 S. C. 451; *Dows v. Congdon*, 28 N. Y. 122; *Ray v. Northrup*, 55 Wis. 396; *Bolles v. Stockman*, 42 Ohio St. 445.

The reason of the rule is obvious. A party against whom an order is made vacating and setting aside a judgment may have all his wrongs redressed, and his rights protected, upon a new trial. If the party whose judgment is vacated succeeds upon a new trial, he has suffered no injury. If he has a fair trial, he should not complain, as he has all the law contemplates. If these rights are not protected upon a final hearing, the errors can usually be corrected upon appeal from the final judgment. "The policy of the laws of the several states and of the United States is to prevent unnecessary appeals. The appellate courts will not review cases by piecemeal. The interests of litigants require that causes should not prematurely be brought to the higher courts. The errors complained of might be corrected in the court in which they originated; or the party injured by them might, notwithstanding the injury, have final judgment in his favor. If a judgment interlocutory in its nature were the subject of appeal, each of such judgments rendered in the case could be brought before the appellate court, and litigants harrassed by useless delay and expense, and the courts burdened with unnecessary labor." 1 Freem. Judgm. § 33. If it be claimed that the right of appeal is guaranteed under the statute, the answer would be that a citizen has no vested right in the statutory privileges or exemptions. The statutory right to have any particular question reviewed on appeal may be taken away by the repeal of the statute. The constitution has taken away the right of appeal from the order vacating and setting

aside the judgment appealed from. Cooley, Const. Lim. pp. 471-473; *Ex parte McCordle*, 7 Wall. 506. The appeal in this case is dismissed, with costs.

ZANE, C. J., and BARTCH, J., concur.

STATE, RESPONDENT, v. FRANK McDONALD,  
APPELLANT.

14	173
22	253
22	254
22	255

ASSAULT WITH INTENT TO KILL—INDICTMENT—MALICE AFORE-  
THOUGHT—DESCRIPTION OF OFFENSE—INSTRUCTION.

1. Defendant was found guilty of an assault with intent to do bodily harm, under an indictment of an assault with intent to murder, and excepts to the sufficiency of the indictment, and to the charge to the jury. The indictment alleges that defendant "did unlawfully assault one S. with a deadly weapon, to wit, a revolver, loaded with powder and leaden bullets, which he, the said Frank McDonald, then and there held in his hands, and then and there tried to discharge upon and into the body of the said S., with the intent him, the said S., to then and there kill and murder." Where the offense is described in the statute in the terms, "Every person who assaults another with intent to commit murder" (Comp. Laws 1888, § 4471), the words "with malice aforethought" are not necessary in the indictment, as the word "murder" sufficiently described the crime. From the description the defendant and the court could understand the offense charged, and the defendant's conviction of it can be pleaded in bar of another prosecution for the same crime.
2. By statute (section 4488, Comp. Laws of Utah 1888), the crime is defined as follows: "Every person who, with intent to do bodily harm, and without just cause or excuse, or when no

considerable provocation appears, or when the circumstances show an abandoned or malignant heart, commits an assault upon the person of another, with a deadly weapon, instrument or other thing, is punishable," etc. The allegations in the indictment that the assault was unlawful, and that it was done with intent to murder, exclude the existence of "just cause" or "excuse" or "considerable provocation" as clearly as the words themselves would have done, and their use in the indictment was unnecessary under the above section.

3. It was not necessary for the court, in its charge to the jury, to use all the words in the description of the statutory definition; hence the words "without just cause or excuse" were sufficient, without adding thereto the words "or when no considerable provocation appeared."

*People v. Fairbanks*, 7 Utah 3, overruled.

(No. 706. Decided Oct. 30, 1896.)

Appeal from the district court of the Third judicial district, Territory of Utah. Hon. S. A. Merritt, *Judge*.

Frank McDonald was convicted of assault, and appeals. *Affirmed*.

*Powers, Straup & Lippman*, for appellant.

*A. C. Bishop*, Attorney General (*B. X. Smith*, of counsel), for the State.

An assault with intent to kill necessarily includes an assault to do bodily harm, for a person cannot be killed without bodily harm being done. *Territory v. Gatliffe*, 37 Pac. 809; *State v. Triplet*, 35 Pac. 815; *State v. Collyer*, 30 Pac. 891; *Bean v. State*, 8 S. W. 278; *State v. McLennen*, 16 Pac. 879; *People v. English*, 30 Cal. 215; *People v. Gordon*, 99 Cal. 227; *People v. Pope*, 66 Cal. 366; *People v. Bentley*, 75 Cal. 407; *State v. Robey*, 8 Nev. 312; *People v. Kiefe*, 40 N. Y. 355; *People v. Lightner*, 49 Cal. 228; *Territory v. Conrad*, 1 Dak. 363; *People v. Bentley*, 17 Pac. 436.

ZANE, C. J.:

The defendant was indicted for assaulting one Emil Sacherson, with intent to murder him, and was found guilty of an assault with a deadly weapon, with intent to do him bodily harm. On this trial, the court overruled an objection to the admission of any evidence under the indictment, and also a motion for a new trial, and a motion in arrest of judgment, and sentenced him to four months' imprisonment. From the order overruling the motion for a new trial, and the sentence, the defendant has appealed. He alleges that the court erred in holding that a public offense was described in the indictment, and in admitting evidence under it.

The offense charged in the indictment is defined in the statute as follows: "Every person who assaults another with intent to commit murder is punishable by imprisonment in the penitentiary, not less than one, nor more than ten years." Comp. Laws Utah 1888, § 4471. The offense is described in the indictment as follows: "Frank McDonald is accused by the grand jury \* \* \* of the crime of assault with intent to commit murder, committed as follows: The said Frank McDonald, on the 11th day of August, A. D. 1895, at the county of Salt Lake, in said territory of Utah, did unlawfully assault one Emil Sacherson with a deadly weapon, to wit, a revolver, loaded with powder and leaden bullets, which he, the said Frank McDonald, then and there held in his hands, and then and there tried to discharge upon and into the body of the said Emil Sacherson, with the intent him, the said Emil Sacherson, to then and there kill and murder. \* \* \*" The crime designated as an assault with intent to murder is described in the above section of the law in very general terms. It consists of the terms, "Every person who assaults another with intent to commit murder." Counsel does not object to the



description of the offense in the indictment so far as it mentions actual physical acts; but he insists that the other element of the crime is not sufficiently described, to wit, the intent; that the term "murder" is not a sufficient description of that crime in an indictment for an assault with intent to murder. He insists that the words "with malice aforethought" should be added to the words "unlawful assault with intent to commit murder." The law defines "murder" as "the unlawful killing of a human being with malice aforethought." *Id.* § 4452. To any man of ordinary intelligence, as well as to a lawyer or judge, "murder" means "killing with malice aforethought," and, conversely, "killing with malice aforethought" means "murder." The phrase "assault with intent to kill" is sometimes used. In the Utah statute, "assault with intent to commit murder" is adopted. The former term would include all intentional homicides, while the latter includes only killing with malice aforethought; in other words, murder. The killing may be without malice, as in manslaughter; or excusable and intentional killing, as in the execution of a convicted person; or in self-defense, as in justifiable homicide. In the latter case the statute declares that the slayer must act wholly from his fears, not in any degree from malice. The crime that the indictment alleges the defendant intended to commit is described with as much clearness by the use of the term "murder" as it would be by the use of the terms "killing with malice aforethought." The use of the latter term is required in indictments for murder, but the question here is, are they required in indictments for assault with intent to commit murder?

The second subdivision of section 4930 of the Laws of Utah of 1888 requires "a clear and concise statement of the acts or omissions constituting the offense, with such

particulars of the time, place, person and property as will enable the defendant to understand distinctly the character of the offense complained of, and answer the indictment." Subdivision 6, § 4938, Id., declares "that the act or omission charged as the offense [must be] clearly and distinctly set forth, without repetition, and in such a manner as to enable the court to understand what is intended." Section 5255 declares that "neither a departure from the form or mode prescribed by this act in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant or tended to his prejudice, in respect to a substantial right." In this indictment these acts are alleged: "An unlawful assault with a deadly weapon, to wit, a revolver loaded with powder and leaden bullets, held in the defendant's hands, and which he then and there tried to discharge upon and into the body of Sacherson." The acts are clearly stated, and the intent with which they were performed is alleged to have been to kill and murder Sacherson. The acts and the intent as alleged, we are of the opinion, sufficiently describe a public offense. From this description the defendant and the court could understand the offense charged, and the defendant's conviction of it can be pleaded in bar of any other prosecution for the same crime. *People v. Swenson*, 49 Cal. 388.

But defendant also insists that he was convicted of a crime not described in the indictment. The offense of which the defendant was convicted is defined in section 4488, Comp. Laws Utah 1888: "Every person who, with intent to do bodily harm, and without just cause or excuse, or when no considerable provocation appears, or when the circumstances show an abandoned or malignant heart, commits an assault upon the person of

another, with a deadly weapon, instrument, or other thing, is punishable by imprisonment in the penitentiary not exceeding two years, or by fine not exceeding one thousand dollars, or by both." The objection is that the indictment does not say that the assault was not without just cause or excuse, or that no considerable provocation appeared, or that the circumstances showed an abandoned or malignant heart. The allegations of the indictment do exclude the possibility of the existence of any just cause or excuse for the assault, or the possibility of the existence of any provocation which the law regards as a considerable provocation; and, that being so, an allegation that the circumstances showed an abandoned and malignant heart would have been superfluous. If the killing of a person should be purely accidental, from a lawful act performed by another with due care and circumspection, the killing would be excusable; or, if an officer executes a condemned criminal, the killing would also be excusable; or if a person were to slay another when assaulting him under circumstances of danger, sufficient to induce in him a reasonable belief of the necessity to do so to save his own life, or under such circumstances as the law would regard as a justification, the killing in either case would be justifiable and lawful. The definition of murder excludes the idea of any just cause or excuse for the killing, or any provocation, however great, to justify it. Killing upon just cause or excuse, or upon a considerable provocation, would be excusable or justifiable homicide, and in either case the killing would be lawful. The circumstances might be such as to reduce the killing from murder to manslaughter, but that would not justify or excuse it. The definition of an "assault" will not admit of a just cause or excuse, or of a considerable provocation. A just

cause or excuse, or a considerable provocation, makes the attempt at violence lawful. It is true that the term "assault" is used in the section defining the offense of which the defendant was convicted; but it must have been used there in the sense of an attempt to commit violence, or the use of violence for which there might be a just cause or excuse, or a legal provocation. In the indictment, however, the assault is alleged to have been unlawful. The allegations in the indictment that the assault was unlawful, and that it was with the intent to murder Sacherson, exclude the existence of just cause or excuse, or any considerable provocation, as clearly as the words "without just cause or excuse," or that "there was no provocation," would have done. We hold that the offense of which the defendant was convicted was included in the crime described in the indictment, as therein alleged.

The court charged the jury, among other things: "If you find that the said defendant made an assault upon Emil Sacherson without just cause or excuse, with the intention of doing him bodily harm, you should find him guilty of an assault with a deadly weapon, with intent to do bodily harm." To this the defendant excepted, because the court did not add after the words "just cause or excuse" the words "or when no considerable provocation appeared." It is impossible to conceive of a considerable provocation when the assault is made without just cause or excuse. We find no reversible error in this record. The judgment and order appealed from are Affirmed.

BARTCH and MINER, JJ., concur, and the case of the *People v. Fairbanks*, 7 Utah 3, is overruled.

STATE EX REL. RICHARDS, STATE AUDITOR, v.  
CHARLES E. STANTON, COUNTY CLERK.

COUNTY CLERK—FEES—PAYMENT TO STATE—PENALTY FOR NON-  
COMPLIANCE—STATE AUDITOR—DUTIES—MANDAMUS.

1. Under sections 1 and 2 of article 21 of the constitution of Utah, and the enactment of the legislature passed in pursuance of the said constitutional provisions (chapter 16, p. 89, Sess. Laws 1896), making it the duty of the county clerk to pay all fees collected by him in the district court in criminal and civil cases, except probate fees, into the state treasury, said payment should begin as provided by law on the 1st day of April, 1896, and continue quarter-yearly thereafter, and include all fees collected from and after the admission of the state into the Union, January 4, 1896; and there is no ambiguity or uncertainty in these provisions of the constitution or laws of the state, and no valid reason for not enforcing them.
2. Under section 4, c. 58, p. 162, Sess. Laws 1896, the failure of the county clerk to pay into the state treasury the fees collected by him in the district court in criminal and civil cases, except probate fees, after an account has been stated with him, and demand made, entitled the state to charge said clerk 25 per cent damages on the amount delinquent, and interest at the rate of 10 per cent per annum, from the time of the failure to pay.
3. The fact that the county clerk, by order of the board of county commissioners, paid the amount due the state to the county treasurer, does not release the clerk from his liability under the law; nor is it necessary in such a case that the petition for a writ of *mandamus* should make the county treasurer a party defendant to this action, since he is a stranger to the proceedings.
4. It is the duty of the state auditor to examine the accounts of state and county officers, and become satisfied that the accounts rendered are correct, and that the fees provided by law to be collected and paid to the state treasurer by such

officers are collected, reported, and paid. If such fees are not paid as provided by chapter 58, p. 159, Sess. Laws 1896, the auditor should institute proper proceedings for the payment of the same to the state treasurer.

5. *Mandamus* is a proper remedy in such cases.

(No. 747. Decided Oct. 24, 1896.)

*Mandamus* by the State on relation of Morgan Richards, Jr., state auditor, directed to Charles E. Stanton, clerk of the Third judicial circuit court, for Salt Lake county. Peremptory writ awarded.

A. C. Bishop, Attorney General, for plaintiff.

C. O. Whittemore, County Attorney, for defendant.

No briefs were filed in this case.

MINER, J.:

The plaintiff, as state auditor, filed his petition for a writ of *mandamus* requiring the defendant, as clerk of the Third judicial district court in and for Salt Lake county, to pay into the state treasury the sum of \$4,101.70, collected by him as fees in civil and criminal cases, except in probate cases, in said county, between the 4th day of January and the 4th day of June, 1896, both days inclusive, which sum he had failed to pay into the state treasury, after demand in writing, as required by law, etc. Plaintiff subsequently filed his amended and supplemental petition. This petition alleges, among other things, that from the 4th day of January, 1896, to March 31, 1896 (both days inclusive), the defendant, by virtue of his office, collected and received fees in criminal and civil cases, except probate fees, to the amount of \$2,455.95, and that from the 1st day of April to the 4th day of June, 1896 (both days inclusive), defendant likewise so collected

and received fees in criminal and civil cases in said court, except probate fees to the amount of \$1,645.57; that the law specifically enjoined upon the defendant, as a duty resulting from his office, to pay the first-named sum into the state treasury on the 1st day of April, 1896, and to pay the last-named sum on the 1st day of July, 1896; that said defendant, at the time when said payments were due, failed to render any account thereof, and make settlement with the state auditor within the time prescribed by law, and has failed and neglected to pay said fees into the state treasury of the state of Utah, or otherwise account and pay over to the state said fees so collected, or any part thereof; that on July 20, 1896, demand in writing was made upon said defendant, by the plaintiff, for a full, true, and itemized statement of all fees, except probate fees, received by him, as clerk of said court, in civil and criminal cases, from January 4, 1896, to June 4, 1896 (both days inclusive), and that he promptly pay over such money into the state treasury; that, in compliance with such demand, said defendant made to plaintiff a written statement, showing the sum of \$4,101.70 had been collected by defendant in civil and criminal cases, except probate cases, between January 4 and June 4, 1896 (both days inclusive), said statement being an itemized statement of such account, but that defendant refused, and still refuses, to pay said or any fees into the state treasury, or otherwise account for the same; that on October 7, 1896, affiant stated an account with said defendant, specifying the amount of the fees, the time when the same became due and payable, with the amount of damages and interest due thereon, as provided by law, and that the total sum due the state, including damages and interest, amounts to \$5,299.02, and prays a writ of mandate, directing such defendant to pay into the state treasury the sum of \$4,101.70, and judgment for the sum

of \$1,197.32, damages and interest as set forth in the account stated, which account is annexed to the petition, etc. To the complaint filed, the defendant interposed a demurrer, on the ground that such complaint does not state facts sufficient to constitute a cause of action, and that said complaint was unintelligible, ambiguous, and uncertain, and that it does not set forth a detailed statement of the fees alleged to have been collected in civil and criminal cases, except probate cases, from which the amount of fees collected by the defendant in such cases for any given period of time can be ascertained. Defendant also filed his answer to the original complaint, admitting the facts set forth in the complaint, so far as is important in this decision, and, for further answer, alleged that on July 1, 1896, and prior to said demand, he, as such clerk, by order and instruction of the board of county commissioners of Salt Lake county, turned over to W. P. Lynn, treasurer of Salt Lake county, the full amount of \$4,101.70, being all the fees collected by him as such clerk in all civil and criminal cases, except probate cases, and thereby paid said fees into the treasury of Salt Lake county, as required by the board of county commissioners. Defendant further alleged, in paragraph 7 of said answer, that said W. P. Lynn, as county treasurer, should be made a party to this action, and prays that he be made a defendant in this suit. Thereupon the attorney general moved to strike out all of said paragraph 7 in said answer, as being irrelevant and redundant. No answer was filed to amended supplemental petition.

The constitution of the state of Utah was in force from the 4th day of January, 1896, that being the day upon which the president of the United States issued his proclamation declaring the state of Utah admitted into the Union. Const. Utah, art. 24, § 16. Section 1 of article



21 of the constitution of Utah provides that "all state, district, city, county, town and school officers, excepting notaries public, boards of arbitration, court commissioners, justices of the peace, and constables, shall be paid fixed and definite salaries: provided, that city justices may be paid by salary when so determined by the mayor and council of such cities." \* \* \* Section 2 of article 21 of the constitution provides that "the legislature shall provide by law the fees which shall be collected by all officers within the state. Notaries public, boards of arbitration, court commissioners, justices of the peace, and constables paid by fees shall accept such fees as their full compensation. But all other state, district, county, city, town, and school officers shall be required by law to keep a full and correct account of all fees collected by them, and pay the same into the proper treasury, and the officer whose duty it is to collect such shall be held responsible for the same." The state legislature, at its first session, February 17, 1896, in compliance with the provisions of the constitution, enacted chapter 16, found in Sess. Laws 1896, p. 89, which provided "that all state, district, county, city, town and school officers in the state, excepting notaries public, boards of arbitration, court commissioners, justices of the peace and constables, shall collect in advance for services performed, such fees as were provided for by the laws of the territory of Utah, for like or similar services at the time the constitution of this state was adopted, and pay such fees into the public treasuries as follows: All fees collected by said state officers and clerks of district courts in criminal and civil cases, except probate fees, shall be paid into the state treasury. \* \* \* the said payments shall be made by the said officers respectively into the respective treasuries, beginning on the first day of April, 1896, and quarter yearly thereafter, and shall include all fees collected

from and after the admission of this state to the Union." The legislature, at its first session in 1896, also fixed, by law, the salary of county clerks. Sess. Laws 1896, p. 364.

It is clear from these provisions of the constitution, and the statutes enacted in conformity therewith, that this proceeding is properly brought to compel the performance of a duty specifically enjoined by statute, resulting from an office, and which the defendant has failed to perform as required by law. It is equally clear from the pleadings that the complaint does state facts sufficient to constitute a cause of action, and that the same is not ambiguous, unintelligible, or uncertain. It does not follow that because the defendant has seen fit to pay the money in question to W. P. Lynn, county treasurer, with or without the order of the county court, that the plaintiff should be compelled to make Lynn a party defendant to this action. The defendant, as a public officer, should not be permitted to shift his pecuniary or official responsibilities in that way. The law holds the clerk responsible to the state for the faithful performance of his duty; and we must hold him responsible under such law. So far, Mr. Lynn is and should be treated as a stranger to the proceeding. The order of the county court, if made as claimed, is a mere nullity. Neither the constitution nor laws of the state confer upon the county court authority to dispose of such fees belonging to the state. The payment of the fees by the county clerk to the county treasurer was a wrongful assumption of power, and a clear violation of official duty, and cannot be upheld when set up as a defense in this case. *Williams v. Clayton*, 6 Utah 86; *Kendall v. Raybould*, (Utah), 44 Pac. 1034. The plaintiff is not shown to be a party to, or in any way connected with, the illegal transfer of the funds in question to the custody of Mr.

Lynn. It follows that the demurrer should be overruled, and that the seventh paragraph of the answer should be stricken out and disregarded.

Under section 1 of article 21 of the constitution, "all state, district, city, county, town, and school officers, excepting notaries public, boards of arbitration, court commissioners, justices of the peace, and constables, shall be paid fixed and definite salaries." This and the following section limit the compensation to be paid county clerks to such sums as the legislature shall provide by law. Under section 2 of article 21 of the constitution, all state, district, county, city, town, and school officers are required, as a part of their official duty, to keep a true and correct account of all fees collected by them, and to pay the same into the proper treasury, and the officers whose duty it is to collect such fees are held responsible for the same. Under the act of the legislature, Sess. Laws 1896, p. 89, it is made the duty of these officers to collect in advance, for services performed, such fees as were provided by law by the territory of Utah for like or similar services at the time the constitution was adopted, and pay such fees into the public treasury, as follows: All fees collected by the said state officers and clerks of district courts in criminal and civil cases, except probate fees, are to be paid into the state treasury, beginning on the 1st day of April, 1896, and quarter yearly thereafter; and said fees should include all fees collected from and after the admission of the state into the Union. There seems to be no ambiguity or uncertainty in these provisions of the constitution or laws of the state, and we find no valid reason for not enforcing them. The law makes it the duty of the county clerks to keep a true and correct account of the fees collected by them, and to pay the same into the state treasury. Section 5, c. 58, p. 162, Sess. Laws 1896, provides that "whenever

any person has received moneys, or has money or other personal property which belongs to the state by escheat or otherwise, or has been intrusted with the collection, management or disbursement of any moneys, bonds or interest accruing therefrom, belonging or held in trust by the state, and fails to render an account thereof to, and make settlement with, the state auditor within the time prescribed by law, or when no particular time is specified, fails to render such account, and make settlement, or who fails to pay into the state treasury any moneys belonging to the state, upon being required so to do by the state auditor, within twenty days after such requisition, the state auditor must state an account with such person, charging twenty-five per cent. damages, and interest at the rate of ten per cent. per annum, from the time of failure." \* \* \* Before final settlement is made with any of said officers for fees collected for the state, it is the right and imperative duty of the state auditor carefully to examine, either by himself or by expert accountants, the books and papers of each of said county or state officers, and become satisfied that the accounts as stated or rendered are correct, and that the legal fees have been duly collected and reported; and, if no account has been rendered, it is equally the duty of the state auditor to carefully examine, or cause to be examined, by competent experts, all such books and accounts, in compliance with chapter 58, p. 159, Sess. Laws 1896, and take proper steps to enforce these several provisions of the law, and recover the damages therein provided. In this manner the laws can be faithfully executed, and the revenues of the state brought into the proper treasury, in compliance with the constitution and laws of the state.

An account was stated by the plaintiff, as alleged in the petition, as follows:

"C. E. Stanton, Clerk of the Third Judicial District Court in and for the County of Salt Lake and State of Utah, in Account with the State of Utah, Dr.

To fees collected in civil and criminal cases in the Third judicial district court in and for the county of Salt Lake, except probate fees, from January 4, 1896, to March 31, 1896, both days inclusive...	\$2,455 95
To 25 per cent. damages for failure to render an account thereof to, and make settlement with the state auditor within the time prescribed by law.....	618 98
To interest at the rate of ten per cent. per annum from the 1st day of April, 1896, to the 7th day of October, 1896, both days inclusive.....	127 57
To fees collected in civil and criminal cases in the Third judicial district court, in and for the county of Salt Lake, state of Utah, except probate fees, from the 1st day of April, 1896, to the 4th day of June, 1896, both days inclusive.....	1,645 75
To damages for failure to render an account thereof to, and make settlement with, the state auditor, within the time prescribed by law, at 25 per cent.....	411 48
To interest at the rate of ten per cent. per annum from July 1, 1896, to October 7, 1896, both days inclusive.....	44 34
	<hr/> \$5,299 02"

Section 3730, Comp. Laws Utah 1888, provides that "the writ of mandate may be issued by any court in the territory, except a justice's or probate court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station.

\* \* \* It is clear that the law enjoined upon the defendant the duty of paying into the state treasury the fees collected by him at stated times named in the statute, and that the defendant has failed and neglected to pay said fees and damages, with interest, into the state treasury, after demand of payment by the plaintiff, and

after a statement of the account, as required by the statute. The statute of 1896 (page 162) fixes the amount of damages to be recovered by the state in a case of this character at 25 per cent., and interest at the rate of 10 per cent. from the time of the failure to pay, and makes it the duty of the auditor to charge these stated sums as fixed damages, arising from the failure of official duty resulting from an office, in addition to the amount of fees withheld. Under the pleadings, the statement of the account, as set out in the amended supplemental petition, must be taken as the true and correct amount belonging to the state in the hands of the defendant, which he has failed to pay over, including damages and interest. No denial or answer has been filed by the defendant to the amended supplemental complaint.

We therefore find that defendant has collected, and failed to pay over to the state treasurer, after demand, and as provided by law, fees collected by him as clerk of the Third judicial district court, except probate fees, the following sums of money, to which damages of 25 per cent. are added, and interest at the rate of 10 per cent., in accordance with the statute, as follows:

Fees collected from January 4 to March 31, 1896, both days inclusive.....	\$2,455 95
Twenty-five per cent. damages thereon.....	613 98
Interest thereon at the rate of ten per cent. from April 1, 1896, both days inclusive.....	127 57
For fees collected from the 1st of April, 1896, to the 4th day of June, 1896, both days inclusive..	1,645 75
Twenty-five per cent. damages thereon.....	411 43
Interest thereon at ten per cent. from July 1, 1896, to October 7, 1896, both days inclusive.....	44 34
<hr/>	
—Making a total sum of.....	\$5,299 02

It is therefore ordered that said defendant, Charles E. Stanton, forthwith pay to the state treasurer the said

sum of \$5,299.02, together with interest thereon, at the rate of 10 per cent., from the 7th day of October, 1896. It is further ordered that a peremptory writ of mandate issue as prayed, and in accordance with this opinion, and that the plaintiff recover costs.

ZANE, C. J., concurs.

BARTCH, J. (concurring.) The defendant filed no answer to the amended petition. He admitted that as clerk of the district court of the Third judicial district, in and for Salt Lake county, he collected the principal sum of money, as provided by law, but failed to pay it into the state treasury, and, upon demand made therefor by the proper officer, refused to make payment. His own admission, therefore, fixes definitely the amount he withheld, and still withholds from the state treasury, contrary to law, and which it was his plain duty to pay over. This being so, I concur in the conclusion reached.

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GRANVILLE GILLETT, RESPONDENT, *v.* THOMAS  
E. TAYLOR, APPELLANT.

BILLS AND NOTES—SURETIES—DISCHARGE—PAROL EVIDENCE.

1. Plaintiff brought his action upon a promissory note. The defendant set up an affirmative defense, and offered to prove that, although he had signed the note as principal, he was in fact only a surety; that at or shortly after maturity, without the knowledge or consent of defendant, the plaintiff extended

14	190
15	487
14	190
d16	58

the time of payment; and that plaintiff knew, at the time the payment was extended, that defendant was only a surety. *Held*, that the defense was proper, and the evidence offered admissible.

2. Where the payee of a promissory note, after having knowledge of the relation of suretyship existing between the joint makers, enters into a new agreement with the principal debtor to extend the time of payment, or do any act to continue the liability of the surety, without his consent, the surety is discharged.
3. Where a person signs a note as maker, but is in fact a surety, and there is nothing on the face of the note to show his true relation, he will be treated and considered as a principal with respect to all who have no notice of the suretyship; but, whenever it is material in his defense to an action against him on the note, he may offer and prove by parol evidence that he made the note merely as surety, without consideration, and that such fact was known to the plaintiff before the equities through which such evidence became admissible arose.

(No. 733. Decided Oct. 21, 1896.)

Appeal from the Third district court, Salt Lake county.  
Hon. John A. Street, *Judge*.

Action on a promissory note by Granville Gillett against Thomas E. Taylor. From a judgment for plaintiff, defendant appeals. *Reversed*.

*Richards & Richards*, for appellant:

The burden is not upon the defendant to show an *express* agreement between the plaintiff and another who signed the note with defendant that the defendant was accepted as a surety. *Edwards on Bills*, sec. 573; *Bailey v. Edwards*, 4 Best and S. Q. B. 761; *Swire v. Redman*, Q. B. Div. 536; *Wheat v. Kendall*, 6 N. H. 504; *Meggett v. Baum*, 57 Miss. 22; *Gould v. Butler*, 127 Mass. 386; *Marinier's Bank v. Abbott*, 28 Me. 280; *McMuken v. Webb*, 6 How. 292.



It is proper to show by parol evidence that defendant was in fact a surety or accommodation maker and that the plaintiff had knowledge of the fact. 2 Daniel on Neg. Inst., sec. 1334 and note; *Rose v. Williams*, 5 Kan. 489; *Perry v. Hudnet*, 38 Ga. 104; *Hubbard v. Gurney*, 64 N. Y. 460; *Harmon v. Hale*, 1 Wash. Ter. 423; *Grafton Bank v. Kent*, 4 N. H. 221; *Coates v. Swindle*, 55 Mo. 31; *Rarrett v. Ferguson*, 9 Mo. 125; *Stilwell v. Aaron*, 69 Mo. 539; *Irvine v. Adams*, 48 Wis. 468; *Barron v. Cady*, 40 Mich. 259, 1 Parsons N. & B. 233, 234 and Note; *Tonenel v. Alexander*, 85 N. C. 143; *Vary v. Norton*, 6 Fed. 808; *McCartney v. Turner*, 49 Ga. 309; *Bank of St. Mary's v. Mumford*, 6 Ga. 56; *Carpenter v. King*, 9 Met. 511.

Defendant may show by parol evidence that there was an express contract that plaintiff was to accept defendant as a surety. *Merrick v. Baury*, 4 Ohio St. 60; *Miller v. Lumsden*, 16 S. W. 161; *Fillfor v. Johnson*, 15 Ala. 384; *Goddon v. Price*, 10 Ind. 385; *Hait v. Baller*, 15 Serg. & R. 162; *Berry v. Griffin*, 10 Md. 27; *Johnson v. Cleaves*, 15 N. H. 322; *Stocumb v. Holmes*, 1 How. (Miss.) 139.

The intent of the parties under all the circumstances is the controlling guide. *Belt v. Hawkins*, 16 S. C. 214; *Weaver v. Nixon*, 69 G. A. 700.

*Barlow Ferguson*, for respondent:

Cited: 55 Cal. 343; 108 Cal. 150. See also, *Aud. v. Magrunder*, 10 Cal. 282; *Dave v. Gordaum*, 24 Cal. 157; 85 Am. Dec. 53; *Shriver v. Lovejoy*, 32 Cal. 575; *Dammon v. Pardow*, 34 Cal. 278; *Chafoin v. Rich*, 77 Cal. 476; *Coots v. Farnsworth*, 61 Mich. 497; *Stroop v. McKenzie*, 38 Tex. 132; *Tiedman on Commercial Paper*, sec. 380; *Weydell v. Luer*, 5th Hill, 448; *Gregory v. Thomas*, 20 Wend. 19; *Bank v. Letcher*, J. J. Marshall, 195; *Griffith v. Grogar*, 12 Cal. 317; *Toby v. Barber*, 5 Johnson 68; *Bonnett v. Smith*, 30 N. H. 256; *Winstod Bank v. Webb*, 39 N. Y. 325; *Tulman v.*

*Smith*, 85 Cal. 287; *Heath v. White*, 3 Utah 480; *Peters v. Beverly*, 10 Pet. 567.

BARTCH, J.:

This is a suit upon a promissory note, dated April 1, 1891, and signed by John W. Taylor and the appellant herein. The defendant, having set up an affirmative defense, offered to prove that, although the appellant signed the note as principal, he was in fact only a surety; that he received no part of the money for which the note was given, or any consideration for its execution or delivery; that at or shortly after its maturity the plaintiff, without the knowledge or consent of the appellant, extended the time of payment for a valuable consideration; and that the plaintiff, at the time he accepted the note, knew that this appellant was only a surety. This offer was rejected, and the proof of defendant limited to an express agreement between the payee and makers, or either of them, that the payee had accepted Thomas E. Taylor as a surety. The note was drawn up in the singular form, and there is no word of description attached to either signature. It appears that, after the note became due, John W. Taylor, the real principal, asked the plaintiff for further time, which was granted, and a new note accepted for the loan, without the knowledge of the appellant. It is also shown that the appellant's signature did not appear on the new note. The court instructed the jury that the only question in the case was whether or not there was an express agreement between the plaintiff and John W. Taylor that the new note, introduced in evidence, was accepted by the plaintiff in payment of the old note. The burden was thus upon the appellant to show, not that he was a surety within the knowledge of the payee when he accepted the note, but that there was an

express agreement between the principal maker and the payee whereby the payee accepted the appellant as a surety.

Counsel for the appellant insist this was contrary to law, and the first question which we will consider is whether, upon suit brought on a promissory note, it is competent for one of two makers to aver affirmatively in his answer, and prove by parol, that he signed the note as surety, and that he was discharged by an extension of time given to the principal debtor by the payee with knowledge of the suretyship. The great importance of this question must be conceded, because of its bearings on business relations; and that there has been some confusion in the authorities regarding such a defense must be admitted. This doubtless arose from the fact that some of both the English and American courts entertained doubts whether such a defense could avail in a court of law. In *Pooley v. Harradine*, 7 El. & Bl. 431, Mr. Justice Coleridge, holding such a defense good in equity, said: "In the more recent cases at law, however, the rule in question has apparently been treated as arising out of the original contract with the creditor; and, if this was a plea of a legal defense, we would probably have felt bound by those authorities, and have left it to a court of error to consider the whole question, taking into their consideration whether the same rule in such matters ought not to exist in courts of law and equity, and to decide, if there be a difference, what the rule should be. As we are, however, called upon to deal with this case as if we were sitting in a court of equity, we think we ought to decide it according to what we believe to be the doctrine in courts of equity." In *Rees v. Berrington*, 2 Ves. Jr. 540, Lord Loughborough said that the form of the security forced these cases into equity, because, when they were bound

jointly and severally, the surety could not aver, by pleading, that he was bound as surety. And Mr. Chief Justice Spencer, in *King v. Baldwin*, 17 Johns. 384, disagreeing with this proposition, said: "Now, we could not assent to his lordship's proposition that the fact of a man's being bound as a security could not be averred at law, if it became material to a legal inquiry; for we understood the rules of evidence to be the same in both courts, and we in vain sought for the principle which allowed the inquiry in a court of equity and denied it in a court of law." In *Artcher v. Douglass*, 5 Denio 509, Mr. Chief Justice Beardsley, delivering the opinion of the court, said: "The fact, when ascertained, if sufficient in equity, is equally valid as a legal defense. The doubt is as to the reception of parol evidence to prove the fact in a court of law." *Strong v. Foster*, 17 C. B. 201; *Pintard v. Davis*, 21 N. J. Law 632; *People v. Jansen*, 7 Johns. 332.

The main objection urged against such a defense at law appears to be that it is an attempt to vary the terms of a written instrument; but, if this objection be sound, it will obtain equally in equity, because at law and in equity the same general rules of evidence are applied. It is true that, in an action at law, the terms of a written instrument cannot be varied by parol evidence; but this is equally true in an action in equity, except in cases where an action or defense is maintained under some recognized head of equity jurisdiction. It seems difficult to ascertain a good reason why, in a case of the character under discussion, a court of law should reject evidence which would be admissible in a court of equity. Whatever distinction may, under the old system, have obtained respecting the admission of evidence at law and in equity, it cannot be maintained in courts of both legal and equitable jurisdiction, as constituted under the Code. Without, however, invoking the rules of equity, it seems clear

that the evidence admissible under such a defense does not vary the terms of a written instrument, nor change the legal effect thereof. The requirement that the payee, with knowledge of the suretyship existing between the co-makers, shall not do any act, without the knowledge and consent of the surety, which will prejudice the rights of the surety against the principal, in no way impairs the obligations of the contract. It simply prohibits the creditor who has knowledge of the suretyship from ingrafting a new agreement into the contract without the consent of him whose rights will be injuriously affected thereby. Whether a co-maker is principal or surety, the contract is the same. In either case there is a binding obligation to pay, and the presumption is that all the makers are equally liable to the creditor. This presumption, however, may be rebutted, by equities affecting the creditor, with knowledge of the true relation existing between the debtors at the time he performs the act by which he injuriously affects the rights of the surety. The rights of the surety arise out of the circumstances of the case, and do not depend upon the written instrument. The fact that one of the debtors is a surety is collateral to the contract, and hence may be shown by extrinsic evidence. If a co-maker should add the word "surety" to his signature, such signature would not affect the contract, as between him and the payee. His liability to pay would still be absolute, the same as if there were nothing on the face of the instrument to indicate his relation to the principal maker. In either case the obligation to the creditor would be effectual until, with knowledge of the relation of the debtors, the creditor had done some act which had injuriously affected the position and rights of the surety. The principal and surety being equally liable to the payee, the surety has the undoubted right, at the maturity of the note, to request the payee to enforce payment,

or to pay himself, and then be placed in the position of the payee, and be permitted to sue the principal. Such a course may be absolutely necessary as a protection of the surety against the insolvency of the principal debtor. If the payee, with knowledge of the suretyship, has voluntarily placed himself in such a position that neither he nor the surety can enforce payment, there seems to be no sound reason why the payee should longer have recourse against the co-maker, because, under such circumstances, the case falls within the general doctrine relating to principal and surety, whereby the surety is discharged. The payee's action may deprive the surety of a valuable right,—the power to save himself by bringing suit against the real principal. In such case, whether the creditor received the note with knowledge of the suretyship is immaterial. If he had such knowledge at the time when he did the act which injuriously affected the rights and altered the position of the surety, the surety is discharged. All that justice to the creditor requires is that such contract shall not prejudice his rights against the surety until he has notice of the relation between the makers. After he has such notice, the law will not permit him to enter into a new agreement with the principal debtor to extend the time of payment, or do any act to continue the liability of the surety, without his consent. The creditor cannot keep the surety bound beyond the terms of his contract without consulting him, and this produces no inconvenience to, and imposes no hardship upon, the creditor. It follows that evidence is admissible which shows that the creditor, affected by knowledge of the true relation of the debtors, has undertaken to continue the liability of the surety beyond the terms of his contract, without his assent, by a new agreement with the principal debtor. The rule appears to be that, where a person signs a note as maker, but is in fact a surety, and there is nothing on

the face of the note to show his true relation, he will be treated and considered as a principal, with respect to all who have no notice of the suretyship, but that, whenever it is material in his defense to an action against him on the note, he may aver, and prove by parol evidence, that he made the note merely as a surety, without consideration, and that such fact was known to the plaintiff before the equities through which such evidence became admissible arose.

This view of the law, herein expressed, we think, is supported by the weight of authority, both in England and in this country. In *Bailey v. Edwards*, 4 Best & S. 761, Mr. Justice Blackburn, speaking of this doctrine, said: "The principle has been imported from the courts of equity into those of law." And Mr. Justice Coleridge, in *Pooley v. Harradine*, *supra*, speaking of the right of the surety to pay the debt when due, and to be subrogated to the right of the creditor to sue the principal, said: "Now, does this right of placing himself, as it is said, in the shoes of the creditor, depend on a prior contract between the creditor and surety, or on an implied duty of the creditor not to injure the surety's rights when he knows the relation subsisting between him and his principal? We do not see that, by the doctrine asserted in courts of equity, the primary liability is at all altered. In truth, the defense, either at law or in equity, does not arise by any alteration of the original contract, which, indeed, it assumes and relies on in its original terms, but that the creditor cannot fairly or equitably sue the surety where, knowing of the existence of the relation of suretyship, he has voluntarily tied up his hands from proceeding against the principal." In *Guild v. Butler*, 127 Mass. 386, Mr. Chief Justice Gray said: "The fact that one debtor is surety for the other is no part of the contract with the creditor, but is a collateral fact, showing the relation

between the debtors, and, if it does not appear on the face of the instrument, this fact, and notice of it to the creditor, may be proved by extrinsic evidence." So, in *Bank v. Abbott*, 28 Me. 280, Mr. Justice Wells, delivering the opinion of the court, said: "Where the creditor makes an arrangement with one of several debtors, extending the time of payment of the debt, the others, by proving that such arrangement is injurious to them, because they are sureties, do nothing to impair the validity of the original contract, or to vary its terms. The original contract remains in full force and effect.' But the right to ingraft the new matter is defeated by the proof of a relation not exhibited by the note. The testimony to show that the defendants were sureties was properly admitted. It appears to be a well-settled rule of law that, where the creditor, by a contract with the principal, extends the time of payment, upon a sufficient consideration, without the consent of the surety, the latter is discharged." In *Hubbard v. Gurney*, 64 N. Y. 457, Mr. Chief Justice Church said: "If the word 'surety' had been added to the name of the defendant, it is conceded that the defense sought to be interposed would be available in any court; and yet that word, as we have seen, would not affect the contract. The fact, proved by extrinsic evidence, and that the creditor had knowledge of it, is as potent as if added to the name of the surety; and it is potent, not in varying the contract, but in imposing certain duties and obligations upon the creditor in his subsequent dealings with the principal debtor in respect to the contract." So, in *Meggett v. Baum*, 57 Miss. 22, Mr. Justice Campbell, delivering the opinion of the court, said: "It has been the established doctrine in this state that one of several makers of a promissory note or a writing obligatory is not precluded, by the fact that he appears on the instrument to be a principal, and primarily bound, from aver-



ring and proving that he is a surety, and entitled to be discharged by the act of the creditor in so dealing with the principal as to discharge him as a surety; and this is the constant practice in courts of law. \* \* \* The holder of the paper, having no knowledge except that imparted by it, may regard the parties to it as bound accordingly; but, if he has knowledge of the actual relations between the parties, he has no greater right in the one case than in the other to deal with the real principal in such way as to discharge the surety." 1 Pars. Notes & B. 234; *Wheat v. Kendall*, 6 N. H. 504; *Barron v. Cady*, 40 Mich. 259; *Harris v. Brooks*, 21 Pick. 195; *Ward v. Stout*, 32 Ill. 399; *Strong v. Foster*, *supra*; *Swire v. Redman*, 1 Q. B. Div. 536; *Greenough v. McClelland*, 2 El. & El. 424; *Bank v. Kent*, 4 N. H. 221; *Harmon v. Hale*, 1 Wash. T. 422; *Orvis v. Newell*, 17 Conn. 97; *Rose v. Williams*, 5 Kan. 483; *Vary v. Norton*, 6 Fed. 808; *Carpenter v. King*, 9 Metc. (Mass.) 511; *Coats v. Swindle*, 55 Mo. 31; *Barry v. Ransom*, 12 N. Y. 462; *Rees v. Berrington*, 2 Ves. Jr. 540; *Lauman v. Nichols*, 15 Iowa, 161.

In the case at bar the defense averred, and offered to show by proof, that, while the appellant had signed the note in question as maker, he was in fact only a surety; that he received no part of the money, the loan having been made for the benefit of his co-maker; and that the plaintiff, knowing the true relation which existed between him and his co-maker, for a valuable consideration extended the time of payment to the principal without the appellant's knowledge or consent. It is obvious that the evidence offered is admissible, because, if the facts indicated were established, they would show that the payee had undertaken to continue the liability of the appellant beyond the terms of his contract, and this would be a complete defense to the action; so, if it were shown that the plaintiff, with the knowledge of the sure-

tyship, had accepted the new note, due one year after date thereof, in full payment of the old one, without the knowledge and consent of the appellant. It is apparent that the exclusion of the evidence in question was error, and an inspection of the record shows that the case was tried under a mistaken view of the law.

There are various errors assigned, but, as the cause must be reversed, a further discussion is not deemed necessary. The case is reversed, and remanded, with directions to grant a new trial and proceed in accordance with this opinion.

ZANE, C. J., and MINER, J., concur.

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S. W. MORRISON ET AL., RESPONDENTS, v. INTER-MOUNTAIN SALT CO. ET AL., APPELLANTS.

14	201
22	223

MECHANIC'S LIEN—PLEADINGS—WHEN LIEN ATTACHES.

1. Plaintiffs, as sub-contractors, pursuant to the act of the territorial legislature, approved March 12, 1890, filed and served notice of intention to claim a lien on property owned by appellant, and brought suit to foreclose the lien, making no averment in the complaint of the exact amount of the contract between the owner and the original contractor, nor of the payments made under such contract, the same not being of record. *Held*, changing the rule laid down in *Teahen v. Nelson*, 6 Utah 363, that in cases where the original contract is not of record it is not necessary in the pleadings to make averments of the exact amount of such contract, nor is the

sub-contractor required to make positive averments of the payments made under the original contract.

2. The doctrine laid down in *Morrison v. Carey-Lombard Co.*, 9 Utah 70, as to when such liens attach, is here affirmed.

(No. 739. Decided Oct. 31, 1896.)

Appeal from the Third district court, Salt Lake county.  
Hon. M. L. Ritchie, *Judge*.

Action by S. W. Morrison and others against the Inter-Mountain Salt Co. and others to foreclose a sub-contractor's lien. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

*Richards & Richards*, for appellant.

*J. M. Bowman*, for respondents.

BARTCH, J.:

It appears that the Inter-Mountain Salt Company, the appellant herein, was the owner of a certain parcel of land, and contracted with D. W. Gamble to erect a storehouse and factory thereon for the manufacture of salt, and that the plaintiffs, under contract with Gamble, furnished certain materials, which were actually used in the construction of the buildings. Gamble failed to make full payment for the materials, and the plaintiffs, as sub-contractors, pursuant to the act of the territorial legislature approved March 12, 1890, filed and served notice of intention to claim a lien on the property. This suit was brought to foreclose the lien. Josiah C. Williams and John Anderson were made parties defendant, and in their answers set up sub-contractors' liens on the same property. After hearing the case, the court rendered judgment against the appellant company and in favor of the

plaintiffs and defendants, Williams and Anderson, who are also respondents herein. The appellant insists that the complaint does not state a cause of action. This question was raised at the trial by an objection to the introduction of any testimony, and the point most strongly urged in support of the objection is that there is no allegation of the amount due from the owner to the contractor at the date when the first material was furnished, and the case of *Teahen v. Nelson*, 6 Utah 363, is relied on. It was there held "that the complaint should contain an allegation of the amount of the contract with the owner, less any payment for labor performed and materials furnished under the same, made before the plaintiff commenced work or the delivery of materials on his sub-contract." This rule was declared under the law as it stood prior to the act of 1890, when very material changes were made respecting mechanics' liens. If, under that act, the rule should be strictly and literally enforced in the case of sub-contractors, the object of the law would, doubtless, in many cases, be defeated, because by collusion the owner and principal contractor could withhold from the sub-contractor the terms of the original contract, or any information in relation thereto, he not being a party to such contract. In cases where such contract is not of record, the sub-contractor is not in position to know the amount thereof. Nor is he in a position to know what payments have been made thereunder. In this case it was alleged in the complaint that at the time of "serving the notice of lien there was due the said Gamble, upon said contract, from the said Inter-Mountain Salt Company, as plaintiffs are informed and verily believe, the sum of one thousand dollars or more." It is true this allegation is based on information and belief, but, the plaintiffs being sub-contractors, we cannot assume that they had positive knowledge of the exact amount due, and

therefore cannot hold it bad for that reason. Nor is it alleged in express terms that \$1,000 or more was due at the time the first material was furnished by the plaintiffs, but, if such amount was due, as alleged, when notice of lien was served, it is fair to assume that it was due when the first material was furnished. While the allegation in question shows careless pleading, which should not be encouraged, still we are of the opinion that it was sufficient for the purpose of a general objection that the complaint did not state a cause of action. The complaint was doubtless subject to demurrer for being uncertain, but not subject to general demurrer on the ground that it stated no cause of action, and therefore not subject to the general objection interposed.

We are also of the opinion that the rule declared in *Teahen v. Nelson* should be so modified as not to require sub-contractors, in cases where the original contract is not of record, to make positive averments in the pleadings of the amount of such contract, and to be further modified so as not to require a sub-contractor to make positive averments of the payments made under the original contract.

The evidence relating to the dates when the first and last materials were furnished, and that showing the amount due from the owner at the time when the first material was furnished or first labor performed by the respondents, was properly admitted under the circumstances and pleadings in this case.

The question as to when such liens attach under the act of 1890 was fully considered in the case of *Morrison v. Carey-Lombard Co.*, 9 Utah 70, and we have no disposition to depart from the doctrine therein announced. There appears to be no reversible error in the record. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

## IN RE STONE'S ESTATE.

14	205
117	84

## LESSOR'S LIEN—RIGHT OF WIDOW TO SUPPORT—PRIORITY.

1. The deceased, in his life-time, occupied a building of the Eccles Lumber Company as a lessee from month to month. Thirty-four days after the death of the lessee, when the occupancy ceased, the lessor instituted proceedings before a justice of the peace for \$270 rent, claiming the benefit of a lien under section 1, of the act of March 8, 1894 (Sess. Laws, p. 123), which provides that the lessor "shall have a lien for the rent due upon all the property of the lessee not exempt from execution, as long as the lessee shall occupy the leased premises, and for thirty days thereafter." *Held*, that it was error for the court to decree that the lessor's claim was superior to all other claims, when the total amount of the estate was only \$567.80, and that the estate, being less than \$1,500, should have been set apart, under section 4118, Comp. Laws 1888, for the use and support of the widow and minor children of deceased.
2. Where the proceedings to enforce a lessor's lien are not instituted until after the time limited by the statute, the lien is gone, and thenceforth the lessor's claim possesses no superiority over that of any other person.

(No. 732. Decided Oct. 24, 1896.)

Appeal from the Fourth district court, Weber county.  
Hon. H. H. Rolapp, *Judge*.

This appeal is by the administrator from a decree of the district court, Weber county, Utah, entered in the matter of the above estate, adjudging the Eccles Lumber Company to have a lien upon certain property of the estate of W. S. Stone, deceased, and ordering that it be satisfied before any part of the estate be assigned for the

use and support of the widow and minor children of said deceased. Decree reversed, with directions.

*Heywood & Tail*, for appellants.

Cited: *Barnum v. Boughton*, 55 Conn. 117; *Hastings v. Meyers Admin.*, 21 Mo. 519; *Brown v. Joiner*, 3 S. E. Rep, 157; *Estate of Johnson*, 41 Vt. 467; *Hildebrand's Appeal*, 39 Pa. St. 133.

*Evans & Rogers*, for respondent.

BARTCH, J.:

It appears from the record of this case that the property of this estate, as shown by the inventory and appraisement, was only of the value of \$567.20. Section 4118, Comp. Laws Utah 1888, among other things, provides that, if it appears from the inventory that the value of the whole estate of a deceased person is less than the sum of \$1,500, the court, upon giving certain notice therefor, and granting a hearing, and after the payment of certain expenses, in case the value is found to be less than that sum, shall, by a decree for that purpose, assign, for the use and support of the widow and minor children, the whole of the estate. The court in this case, in effect, decreed that a certain claim of the Eccles Lumber Company for rent, and for which it claimed a lien on certain personal property of the estate, was superior to all other claims, by reason of a valid and subsisting lien, and, after ordering the claim to be paid out of the proceeds of the sale of said personal property, assigned and set over the residue of the whole estate for the use and support of the widow and minor children. The two questions as to the claim of the Eccles Lumber Company, and as to the setting over of the whole estate for the use and support

of the widow and minor children, were, by stipulation of counsel, tried, presented, and submitted together, and the court passed upon them at the same time and in the same decree. This appeal is from that portion of the decree and judgment relating to the claim and lien of the Eccles Lumber Company, and refusing to set over the whole estate, including the property on which the lien was claimed, for the use and support of the widow and minor children.

The material question, and the one decisive in this case, is whether the Eccles Lumber Company had a valid and subsisting lien for rent on the personal property of the estate which was in the leased building occupied by the deceased in his lifetime. Counsel for the appellant insist that the company had no valid lien, because the proceedings instituted by it to enforce such a lien were not commenced within the time provided by law. Section 1 of the act of March 8, 1894 (Sess. Laws, p. 123), reads as follows: "Lessors, except as hereinafter provided, shall have a lien for rent due upon all of the property of the lessee not exempt from execution, as long as the lessee shall occupy the leased premises, and for thirty days thereafter." It will be noticed that by virtue of this statute the lien provided for exists during the time that the "lessee shall occupy the leased premises, and for thirty days thereafter." The statute seems to contemplate an actual occupancy, limited to that of the lessee, and limits the existence of the lien to 30 days after such occupancy ceases. Therefore, at the expiration of 30 days from the day on which a lessee ceases, for any reason, to occupy such premises, the lien ceases to exist, and consequently to have any force or effect. In this case it is shown by the agreed statement of facts that W. S. Stone, the deceased, in his lifetime, as a lessor of the Eccles Lumber Company, from month to month,



occupied a certain building designated as "No. 274, Twenty-Fifth Street, Ogden City, Utah," at the agreed monthly rental of \$30, payable in advance; that he so occupied the building from the 1st day of July, 1895, "continuously until the day of his death, which occurred on the 26th of March, 1896"; and that on the 29th of April, 1896, the said company filed a complaint before a justice of the peace, making the administrator of the estate, who was appointed April 16, 1896, the defendant, and alleging the sum of \$270 to be due from the defendant and the estate of the deceased for rent of said building, and claiming the benefit of the lessor's lien law. It will be observed, from these facts, that a period of about 34 days elapsed from the date of the death of the lessee, when his occupancy ceased, until the day when the lessor instituted the proceedings before the justice of the peace, claiming the benefit of a lien. This brought the action of the lessor without the terms of the statute, and his lien was gone. Thenceforth his claim possessed no superiority over that of any other person, and, by virtue of section 4118, it having been ascertained that the whole estate was of a value less than \$1,500, became inferior to that of the widow and the minor children. That portion of the decree appealed from was, therefore, unwarranted and erroneous, and must be set aside. Having reached this conclusion, it is not important to discuss the other points raised in the record. The cause is reversed and remanded, with directions to the court below to set aside the objectionable portion of the decree, and modify the decree so as to assign the whole of the estate of the deceased to the widow and minor children.

ZANE, C. J., and MINER, J., concur.

FRANK THOMPSON, EXECUTOR, ET AL., RESPONDENTS,  
v. MORONI SKEEN ET AL. AND RICHARD FLINT,  
APPELLANTS.

SEPARATE MORTGAGES—FORECLOSURE—COSTS—PLEADING—SUFFICIENCY OF ANSWER.

1. The plaintiffs held two mortgages, under two separate debts, on the same property. Judgment without sale of the property was had on the first mortgage, and then both causes were consolidated before the trial in the second suit, without objection. *Held* that, while the plaintiffs ought to have foreclosed both mortgages in one suit, the lien of the mortgages foreclosed in the second was not lost by reason of the first suit.
2. Where a mortgagee brings two suits to foreclose two separate mortgages on the same property, when one would be sufficient, he will be allowed costs in one only.
3. Where the legal representatives of a deceased person in their complaint allege that they are suing under the authority of the will of the deceased, which was probated in a court of record, and all necessary steps taken to enable them to sue, and in the answer the allegations are denied only on information and belief, the denial is not sufficiently specific as to the facts set up. In such case it may be assumed that the facts were admitted, and in such event no evidence of their existence is necessary.

(No. 716. Decided Oct. 31, 1896.)

Appeal from the Second district court, Weber county.  
Hon. H. H. Rolapp, *Judge*.

Action by Frank Thompson, executor of James Thompson, deceased, and Joseph R. Lane, administrator with the will annexed of James Thompson, deceased, against Moroni Skeen and others. The actions were consolidated,

and judgment rendered for plaintiffs, and defendant Richard Flint appeals. *Affirmed.*

*E. T. Hulaniski*, for appellant:

There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. Code of Civil Proc. of Utah, par. 3460; sec. 606, vol. 2, p. 320, Comp. Laws 1888; *Bacon v. Raybould*, 4 Utah 357; *Porter v. Muller*, 65 Cal. 512; *Ould v. Stoddard*, 54 Cal. 613; *Eastman v. Thurman*, 24 Cal. 382.

Whether there was one contract or two is immaterial, so far as this case is concerned, for the subject matter of the two suits already brought against the petitioner was embraced in the first contract. *Bullard v. Thorp*, 66 Vt. 599; 44 Am. St. R. 872.

Two mortgages on the same land must be foreclosed in one action. 17 Hun 424; *Hall v. Arnot*, 80 Cal. 348; *Potter v. Crandall*, 1 Clark Ch. 79; *Tower v. White*, 10 Paige Ch. 395; *Homœopathic Mut. Life Ins. Co. v. Sixbury*, 18 Hun 728.

An objection to the sufficiency of the denials can not be raised for the first time in the appellate court. *People v. Swift*, 96 Cal. 165; *White v. R. R. Co.*, 50 Cal. 419; *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598.

*Whipple & Johnson*, for respondents.

The appellant says that the respondent cannot now raise the question of the sufficiency of the denials for the first time in the appellate court and cites authorities to sustain his position. The rule stated by appellant is correct where the plaintiff treated the denials as creating an issue, but it is not the rule where the plaintiff

treated the denials upon the trial as not creating an issue. The position we take is clearly held in cases cited by appellant upon this point.

BARTCH, J.:

It appears from the record in this case that on the 3d of April, 1893, the defendants Moroni Skeen and Martha I. Skeen made their promissory note to James Thompson, since deceased, in the sum of \$3,000, due in three years from date thereof, with interest at 12 per cent, payable semi-annually, and at the same time made to him six interest coupon notes, each for \$120, to represent 8 per cent of the interest as it would accrue, and also at the same time made to him six notes of \$60 each, to represent the remaining 4 per cent interest, due and payable at stated periods as the interest would accrue. The note given for the principal sum, and the coupon notes of \$120 each, were all secured by one mortgage on a certain tract of land, and the six interest notes of \$60 each were secured by another separate and distinct mortgage on the same land. James Thompson, the payee, died January 2, 1895, and on March 6, 1895, suit was brought to recover the last-mentioned mortgage, in which suit the parties plaintiff and defendant were the same as in the present one. The appellant herein was made a defendant in both suits, and claimed, and set up in his answer, a judgment lien upon the same land as that described in the mortgage. In the first suit, judgment by default was rendered on the 5th of March, 1896, against all the defendants except the appellant herein; and on the day following, upon trial had, judgment was also rendered against him. On the 12th of March, 1895, the second suit was commenced to foreclose the mortgage on the principal sum and coupon notes. After judgment was rendered in the first suit, but before any sale of the prop-

erty was made, the two cases were consolidated, on motion of counsel for the plaintiffs, without opposition, as far as appears from the record, from any of the defendants. Thereafter the case was tried, and judgment entered in favor of the plaintiffs and against all the defendants, and so much of the property ordered to be sold as would be necessary to pay the judgment, interest, and costs of one suit; the plaintiffs to pay the costs of the other.

Under this state of facts, the first question which is presented by this appeal is whether the first suit was a bar to the second. Counsel for the appellant insists that the respondents exhausted all their rights under their mortgages in the first action, so far as the property was concerned, and that the court ought to have dismissed the second action. It is true that section 3460, Comp. Laws Utah 1888, provides that there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property, but we do not think that the case at bar comes within the terms and meaning of this statute. Here there were two separate mortgages securing separate debts, although on the same property; and while the legal representatives of the mortgagee ought to have foreclosed both mortgages in one suit, still, as there was no sale under the first judgment, and both causes were consolidated before the trial in the second suit, without objection, we do not think the lien of the mortgage foreclosed in the second suit was lost by reason of the first suit. One of the strongest objections to be urged against two suits, where one will suffice, is that such a course tends to oppression, by assessing unnecessary costs against the defendant. This lost much of its force in the present instance by consolidating the two cases, and taxing the costs in one of them against the plaintiff.

Where a mortgagee brings two suits to foreclose two separate mortgages on the same property, when one would be sufficient, he will be allowed costs in one only, because, in case of two or more mortgages on the same land, whenever practicable, but one suit should be brought to foreclose the same. 2 Jones Mortg. § 1458; Wilts. Mortg. Forec. § 272; *Demarest v. Berry*, 16 N. J. Eq. 481; *Roosevelt v. Ellithorp*, 10 Paige Ch. 415. Counsel for the appellant cites the case of *Bacon v. Raybould*, 4 Utah 357, to sustain his contention; but an examination of the facts in that case will show that they are very different from the facts in this, and, in the main, the case does not conflict with the views herein expressed, and the conclusion reached was doubtless correct. There is, however, a statement in the opinion which is probably open to criticism. It reads as follows: "A party having one suit, either pending or in judgment, for a debt secured by mortgage, cannot have another action for the recovery of the same debt. His whole claim must be embraced in one suit." If by this is meant that the mere pendency of a foreclosure suit divests, without judgment and sale of the mortgaged property, the lien of another mortgage on the same property, securing another debt due, created by the same transaction as the one sued on, and not included in the same suit, then we cannot assent to the proposition; and, as the language employed is perhaps admissible of such construction, it must be disapproved, so far as it is in conflict herewith.

Counsel for the appellant also contends that there was no evidence introduced to show that the respondents were empowered to sue as the legal representatives of the deceased. Their capacity in this respect was properly alleged in the amended complaint, and denied in the answer only on information and belief, although the appellant had been informed by allegation in the complaint

that the will of the deceased had been probated in Salt Lake county, Utah, and the necessary steps taken to enable the plaintiffs to sue. This was all matter of record, and positive information was therefore within reach of the appellant. Instead of obtaining the real facts respecting this question, the appellant contented himself with denying whole paragraphs of the complaint in a general way, upon information and belief. This was no denial of the specific facts set up. It may therefore be assumed that the facts were admitted, and in such event no evidence of their existence is necessary. Where, as in this case, a verified complaint points to the public record of proceedings, the facts of which are properly alleged in such complaint, the defendant will not, when he can have access to such record, be permitted to answer that he has no knowledge, or information sufficient to form a belief, and base his denial of such facts upon that ground. He cannot plead ignorance of a public record, to which he has access, and can refer and obtain positive knowledge respecting the allegations which he is to answer. *Mulcahy v. Buckley*, 100 Cal. 484; *Loveland v. Garner*, 74 Cal. 298; *Goodell v. Blumer*, 41 Wis. 436.

We do not deem a further discussion of the points presented in the record important, because there appears to be no reversible error. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

RICY H. JONES, APPELLANT, v. NEW YORK LIFE  
INS. CO., RESPONDENT.

14	215
15	279
15	356
15	367
14	215
30	34

ORDER—WHEN FINAL AND APPEALABLE—TIME OF TAKING APPEAL  
—VACATING JUDGMENT.

1. An insurance company, sued upon a policy which it had given, admitted liability, but alleged that two persons made conflicting claims, to the amount due, and the court, upon a hearing, required them to interplead, and upon a deposit of the amount with the clerk made an order discharging the company from further liability. *Held*, that the order was final as to the company, and therefore appealable.
2. An appeal from an order made upon a hearing discharging the defendant, not having been taken within 60 days after notice of it, authorizes the presumption that such facts were proven, as without which the decision could not have been made, as the evidence in the bill of exceptions cannot be considered.
3. A motion to vacate a final judgment comes too late after the term has expired, and after the time within which a motion for a new trial can be made, and it should be denied.

(No. 710. Decided Dec. 11, 1896.)

Appeal from the First judicial district court. Hon. C. H. Hart, *Judge*.

Action by Ricy H. Jones against the New York Life Insurance Company. From various orders, and from judgment plaintiff appeals. Affirmed. This was the second appeal of this case. It was before the territorial supreme court at the June term of 1895. The opinion of the court is found in 11 Utah 401. The final order in this cause was made on the 4th day of March, 1895.



The facts are recited in the opinion rendered by the supreme court of the territory. A long time after the opinion was rendered by the supreme court, the plaintiff made a motion to vacate the final order of the court, and have a new trial. This motion was filed and served February 3, 1896. Appellant appeals from the order entered March 4, 1895, dismissing this defendant from further liability. He also claims to have appealed from the order of the court entered February 21, 1896, denying his motion to vacate and set aside the judgment and grant a new trial.

*John M. Zane*, for appellant.

By a final judgment, it is to be understood, not a final determination of the rights of the parties in the subject matter of litigation, but merely of the particular suit." Syllabus in *Belt v. Davis*, 1 Cal., page 135, citing 13 cases. Enc. Pl. and Practice, vol. 2, p. 53-4, note 3.

A judgment on interpleader is final and appealable, before the determination of the main suit. 2 Enc. of Pl. and Practice, p. 74, note Interpleader; *Weisenecker v. Kepler*, 7 Mo. 52; *Smith v. Sterret*, 24 Mo. 260; *Hutchinson v. McLaughlin*, 15 Colo. 493.

The company denied their liability for interest. In support of the fundamental propositions, that there can be no interpleader when the "party liable" "has incurred an independent obligation," or "if not ignorant of the rights of either claimant," or has acknowledged the title of either, or is in collusion with either, or "admits liability for principal but denies interest." The following cases are cited; *Phister v. Wade*, 56 Cal. 46; Story Eq. Pl. p. 281; 35 Am. Dec. 708, n. 3; Pom. Rem. 2 Ed. p. 461; *Budesburg Mfg. Co. App.*, 106 Pa. St. 275.

That the answer was sham and irrelevant; good in form, false in fact, and not pleaded in good faith, and should have been stricken out and judgment given plaintiff, see Sec. 323, p. 250 Code; *Gorstorfs Toofe*, 18 Cal. 386; *Goldstein v. Krause*, 13 Pac. 232; *Felch v. Beaudrey*, 40 Cal. 439; *Humme v. Hays*, 55 Cal. 337; *Loveland v. Gomer*, 74 Cal. 298; *City et al. v. Straude et al.*, 28 Pac. 778.

The following cases are cited to show the plaintiff's absolute rights, not only against the company but against the whole world: *Ashley v. Ashley*, 3 Sim. 149; *St. John v. Am. Nat. Life Ins. Co.*, 12 N. Y. 3; *Clark v. Allen*, 23 Am. Rep. 498; *Rittler v. Smith*, 2 L. R. A. 845; *Page v. Burnstuce*, 3 McArthur (U. S.) 194; *Henick v. Butler*, 9 West. Rep. 845; Ray on Contractual Limitations.

*Frank Pierce*, for respondent.

ZANE, C. J.:

The plaintiff brought this action upon an insurance policy executed by the defendant on the life of the late Lewis H. Jones, to recover \$1,500 and interest, and he alleged that the policy had been assigned to him by the insured shortly before his death. The defendant filed a pleading designated an answer and interpleader duly verified. The answer admitted the material allegations of the complaint, except that it denied the assignment, and defendant's liability for interest and costs. It alleged by way of interpleader that one B. H. Jones claimed to be administrator of the estate of Lewis H. Jones, and that he claimed as such administrator the money due on the policy; that plaintiff also claimed the money; and that defendant was ignorant of the rights of the respective claimants, and denied collusion with either of them, and offered to bring the money into court, and deliver it to such person as the court might desig-

nate; and upon such delivery the defendant asked the court to discharge it from liability. The plaintiff moved the court to strike out the answer on the ground that it was sham and irrelevant, and for judgment for plaintiff, and for such other order as might be just, and for costs, and cited the defendant into court. The court fixed the 4th day of March, 1895, for the hearing. On that day the parties appeared, and the court, after reciting the cause came on regularly for hearing upon the motion of the plaintiff to strike out the answer from the files, and for judgment on the pleadings; that defendant's answer was duly verified, and was sufficient in law; ordered the same treated as an affidavit; and found, further, that B. H. Jones, as administrator of the estate of Lewis H. Jones, claimed the money sued for; and that the plaintiff, as administrator of the estate of the deceased, also claimed it; and that such claims were without collusion; and that defendant asked that such claimants be substituted, and that the case was a proper one for substitution. The court denied the motion for judgment on the pleadings, and ordered further that B. H. Jones, as administrator of the estate of L. H. Jones, and Ricy H. Jones, as administrator of the same estate, be substituted as parties defendants, and that defendant, the insurance company, on depositing with the clerk of the court \$1,555 principal, and the interest thereon and costs to date, within ten days, should be dismissed from the case, and discharged from further liability. The denial in the answer of liability for interest and costs was waived by defendant. This entire order was excepted to and assigned as error. An appeal from this same order was before the supreme court of the late territory, and that court, after considering it, held that the appeal was not from that part of the order discharging the defendant, the insurance company, and that the part of

the order allowing the parties to interplead, and overruling the motion to strike the answers from the files, was not appealable, and dismissed the appeal.

Whatever may be said as to whether the other parts of the order were final or not appealable, that part dismissing the defendant from the action, and discharging it from further liability, was final as to the defendant, and the rights of the plaintiff against it, and therefore appealable. But this appeal was taken more than 11 months after that judgment was rendered and notice to plaintiff. That being so, we cannot examine the bill of exceptions, and determine therefrom the facts mentioned in the order or essential to it. Subdivision 1, § 3635, Comp. Laws Utah 1888, giving the right of appeal from final judgments or district courts in actions or special proceedings, declares that "an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment." The judgment having been rendered by a court of record and of general jurisdiction, it will be presumed that those facts, without proof of which the judgment could not have been rendered, were proven.

The plaintiff also appealed from the order of the court overruling his motion to vacate the judgment dismissing the defendant from the action, and discharging him from further liability to either party. It also appears that this motion to vacate was made after the term at which judgment was rendered, and after two other terms had intervened. The motion could not be regarded as an application for a new trial, because it came too late. The order sought to be vacated was not void, and it was rendered upon a hearing. It was not a judgment upon default. It was a judgment the court intended to enter

after a hearing, and the court had jurisdiction of the subject-matter and of the parties.

On the hearing the court received the answer and interpleader as an affidavit, as appears from the order. This was not error, as the answer and interpleader were duly verified, and they contained the facts required to be stated in the affidavit required by section 3188, Id. The answer that accompanied the interpleader admitted the liability of the defendant, but denied the assignment to plaintiff; and the interpleader stated that plaintiff and B. H. Jones, as administrators of the estate of L. H. Jones, respectively claimed the money sued for. There being no denial of defendant's liability, we are disposed to hold that it was not error to file it with the affidavit, or as a part of it.

Other exceptions were taken, and appear in the record, and are assigned as error; but upon consideration of them we are of opinion that they should not be sustained. We find no reversible error in the record. Orders appealed from are affirmed.

**BARTCH and MINER, JJ., concur.**

WASATCH MINING COMPANY, RESPONDENT, v. PRIS-  
CILLA JENNINGS ET AL., APPELLANTS.

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16	144
18	308
17	109

MINES—BONA FIDE CLAIMANT—IMPROVEMENTS—EQUITY PRACTICE—  
REFERENCE—FINDINGS—NEW TRIAL—RECORD.

1. Defendants having taken possession of plaintiff's mine with its consent, and having worked it and sold ores extracted, and having received the proceeds, believing they had a right to, upon a decree returning the mine to the owner such defendants should be allowed to retain the reasonable cost of extraction, expenditures of sampling, transportation and sale; and, in addition, they should be compensated reasonable expenditures for its preservation, development, and permanent improvement, to the extent its value was enhanced thereby.
2. The findings of a referee, and a decree of the court thereon, upon a motion for a new trial entered within the time given by the statute, may be set aside by the court at a subsequent term.
3. The trial court has the power to make the record of the case correspond with the actual ruling, notwithstanding an appeal may have been taken to the supreme court.
4. In an equity cause, the court may, upon motion entered in due time, vacate a decree, and treat a verdict of a jury or the findings of a referee as advisory, and make such findings as the evidence may warrant, and enter a decree thereon.
5. Where a case has been heard by a referee, the court may, upon motion for a new trial, or exception taken in due time, hear either, or he may require the motion or exception to be submitted in the first instance to the referee, but such submission will not deprive either party of the right to have such motion or exception afterwards decided by the court.

(No. 705. Decided Dec. 8, 1896.)

Appeal from the Third district court, Territory of  
Utah. Hon. S. A. Merritt, *Judge*.

Action by the Wasatch Mining Company against Priscilla P. Jennings and others for an accounting. From a decree for plaintiff defendants appeal. *Modified.*

This cause came before the supreme court of the territory and is reported in 5 Utah 243, where the briefs are quite fully given.

*Rawlins & Cutchlow*, for appellants.

The court had no authority to vacate the former judgment *except for the purpose of granting a new trial.* 2 C. L. U. 1888, sec. 3400.

In this case the plaintiff abandoned and waived its application for a new trial, and the court, at its request, ignored and disregarded the same and made an order without any motion or proceeding authorized by law.

A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court or by referee. 2 Comp. Laws, sec. 3399.

Where by consent of the parties a case has been referred to a referee for trial, upon whose report a judgment has been entered, if the judgment is vacated and a new trial ordered, such order does not vacate the order of reference, and the new trial or further proceedings in the case must be before the same referee. *Catlin v. Adirondack Co.*, 81 N. Y. 379.

The court after the term cannot of its own motion or otherwise set aside the findings of a referee and a judgment based thereon and make new findings and enter judgment thereon. *Walker v. Campbell*, 26 Pac. Rep. 123.

Upon an application for a new trial, whether the former trial was had before a referee, the court, or a jury, the court passing upon the application for a new trial has no authority to vacate the former judgment and then proceed without trial to find the facts and enter a judgment thereon. *Schroeder v. S. L. C. V. G.*, 60 Cal.

467 to 471; *Ehrichs v. Dennill*, 75 N. Y. 370; *Walstenholme v. Walstenholme Mg. Co.*, 64 N. Y. 272; *Foot v. Life Ins. Co.*, 61 N. Y. 571.

*J. G. Sutherland, W. H. Dickson, and John M. Zane*, for respondent.

ZANE, C. J.:

It appears from the record in this case that the plaintiff was the owner of a mine consisting of the Walker & Walker Extension and Bucky mining claims, and a part of the Pinion claim, and that they were sold upon execution against the plaintiff; that William Jennings and John Clark, two of the stockholders and directors of the plaintiff, took an assignment of the certificate of purchase, before the time of redemption had expired, for the consideration of \$864.05, and that they afterwards obtained a deed to them of the officer, and that the sum so paid, and the assignment and deed, were taken with a verbal understanding between the plaintiff and the assignees that the latter, upon reimbursement within a time named, would convey to the former; that Joseph A. Jennings and Isaac Jennings obtained Clark's interest in the property; and that they, with William Jennings, took possession of it, and personally or by leases operated the same until early in 1883. This case was before the supreme court of the late territory, and the decree from which that appeal was taken was reversed; but we regard all the questions of law, and all the questions of fact, except one, as the case then stood, settled by that decision. *Mining Co. v. Jennings*, 5 Utah 245. In that opinion the court held that the alleged contract, as proven, under which Jennings and Clark obtained the certificate and deed, was not within the statute of frauds, and the deed, though absolute in form, should be regarded



in equity as a mortgage, and that, under the circumstances of their possession and its acquisition, the rights and liabilities of the Jenningses should be determined by the equitable rules regulating the rights and duties of trustees in possession in good faith, and that, therefore, they should be held to account to the plaintiff for the ores extracted by them from the property, and the rents and royalties received, and that they should be credited with the amount paid for the certificate, and the reasonable expenditures in extracting the ores and converting them into money, and other expenditures upon the property, to the extent that they enhanced its value. The case was remanded, with directions to the court below to ascertain the amount of the expenditures of this last-mentioned class; but that court made a general reference of the case to a referee, who, upon consideration of the evidence and the report of the former referee (the late E. T. Sprague), found and reported the sum of \$34,758.61, consisting of expenditures and interest thereon, due the defendants above the receipts from the sale of ores, and of rents and royalties received by and chargeable against them; and the court entered a decree against the plaintiff. But, upon a motion for a new trial by the plaintiff, the court set the decree and findings aside, but did not grant a new trial, and without further hearing, upon consideration of the evidence reported, and of the findings of the referees, Sprague and Marshall, found the sum of \$13,715.43, principal, and a considerable sum of interest, due the plaintiff, above the expenditures credited to the defendants. While the issues were settled by the court, and a final decree ordered, the record before us does not show that it was signed or entered on the record; but, as no objection is made by either party, we are disposed to regard the order of the court appealed from as a final judgment, and

that the case is before us for consideration and decision.

The action of the court in making its findings and granting a decree after setting aside the findings of the referee and the decree thereon, without granting a new trial, was excepted to by the defendants, and has been assigned as error. The referee Marshall made his report of evidence and findings to the district court of the late territory, and that court entered its decree thereon; but, by virtue of section 7 of article 24 of the constitution of the state of Utah, the case was transferred to the district court of the state for such further proceedings as the law authorized. It appears that the motions to set aside the report of the referee and the decree thereon, and for a new trial, were made in due time; and, that being so, we are of the opinion that the district court of the state had jurisdiction of the case, and possessed the power to hear and decide the motion, and to make such further orders and decrees as the law authorized. Though the term at which a case is decided may terminate, the court may act upon a motion, made in due time, to set its decree and findings aside. *Spanagel v. Dellinger*, 34 Cal. 476.

The defendants objected and excepted to the following order, and assign it as error: "In this cause, it appearing to the court, from the record in this case, that the minutes of the decision of the court herein, made on the 11th day of April, A. D. 1896, is not correct, in the respect that it recites that the court entered an order for a new trial of this cause, it is ordered that the minutes of that day be corrected so as to correspond to the opinion and decision and finding of the court on that day rendered and entered in the cause, to the effect that the report and findings of Referee Thomas Marshall, and the judgment entered thereon, be vacated and set aside, and that

a judgment be entered in this cause in accordance with the Sprague findings, so called, and the suppletory findings made and entered by this court on said last-mentioned day. It is further ordered that the decision and finding of the court, which was in writing, and was then rendered, be now filed as of said 11th day of April, 1896. Dated April 28, 1896." After the decision of the court on the 11th, and before the order of the 28th, the defendants appealed; but we are of the opinion that the court had the right to correct the record to make it correspond with the actual ruling of the court, notwithstanding the appeal; the court had the authority to make the record, which is the evidence of the decision and rulings of the court, conform to the decision and rulings as actually made; to make the evidence conform to the facts,—speak and declare the truth. Elliott, App. Proc. §§ 207-209.

The defendants insist that the court erred in adopting the Sprague findings, and in making the additional finding of \$4,572, as the amount of the expenditures for work and improvements that enhanced the value of the property, and not necessary to the extraction of the ores, after setting aside the Marshall findings, and the decree thereon, without a new trial. This claim of the defendants presents two questions for decision: First, Was the court authorized to make the finding and enter a decree, without a new trial, after setting aside the Marshall findings and the decree thereon? Second, Were the expenditures made upon the property, that enhanced its value, but not necessary to the extraction of the ore, correctly estimated?

As to the question whether the court was authorized to consider the evidence reported, and make its findings and enter a decree thereon, after the findings of the

referee had been set aside, without another trial: At law, either party may demand a jury after the verdict or findings are set aside. But in equity the court may, upon motion entered in due time, set aside the decree, for sufficient reason, and treat the verdict or findings of fact as advisory, or it may wholly or in part set them aside, and make such other findings as the evidence may warrant. *Wingate v. Ferris*, 50 Cal. 105; *Bacey v. Gallagher*, 20 Wall. 270. When the decree and findings are set aside because of newly-discovered evidence, an opportunity should be given to present such evidence and any rebutting evidence. The meaning of the order of reference to Referee Marshall is not plain. It says, "To hear and determine the cause, and issues thereon, as remanded by the supreme court, and to report to the court its findings of fact and conclusions of law thereon, and a decree to be entered in said cause on the testimony already taken upon the former hearing of the case." The opinion of the supreme court directed the lower court to make an additional finding,—whether work not directly contributing to the extraction of the ore, for which expenditures were made by defendants, benefited the property, and, if so, how much the property was enhanced thereby. The opinion directed the lower court to take further testimony, if necessary, but the order of reference says that the decree must be entered on the testimony already taken. We are disposed to hold that the referee, under the opinion of the supreme court and the order of reference, had the right to take additional proof, and report the evidence, with its findings of fact and conclusions of law, to the court, and that the court had authority to enter a decree upon its findings, or treat them as advisory, and make such findings as the evidence warranted, and enter a decree thereon. When a motion for a new trial is made, or exceptions

taken in due time, the court may proceed to hear the motion or exceptions, or require them to be submitted in the first instance to the referee, in order that he may grant a new trial, or sustain the exceptions and make correct findings, when he has erred in the first. This, however, would not deprive either party of the right to have the motion or exceptions passed upon by the court afterwards.

With respect to the second question: Were the expenditures made upon the property, that enhanced its value, but not necessary to the extraction of ore, correctly estimated by the court? This action was instituted more than 13 years ago, and the late E. T. Sprague made his report and findings of fact more than 10 years ago. Undoubtedly it was made after a careful examination of the proofs, and appears to be comprehensive and accurate, except that it does not find the amount of the expenditures that benefited the property, but which did not directly contribute to the extraction of the ore. It is as follows:

“(1) William Jennings and John Clark, the predecessors in interest of defendants, and mortgagees and trustees of the property involved in this action, in September, 1877, paid for said property the sum of \$864.05.

“(2) Defendants and their predecessors in interest in said mortgage and trust, between September, 1877, and the beginning of this action, received for ores extracted from said property mortgaged and held in trust, and by them sold, rents and royalties included, the sum of seventy-eight thousand and seventy-seven and 23-100 dollars (\$78,077.23). And the same was so received in the years following, to wit: In 1879, \$1,086.58; in 1880, \$479.77; in 1881, \$12,164.34; in 1882, \$56,089.78; in 1883, \$8,250.76. All said receipts for 1879 were royalties received under a lease.

"(3) Defendants and their said predecessors in interest, over and above the amounts stated in the first finding, between September, 1877, and the beginning of this action, expended in and about the working, improving, and developing said mortgaged property, and in extracting, freighting, and selling ores therefrom, the sum of \$93,510.36. And such expenditures were made in the years, and are classified and apportioned, as follows:

Years.	Labor.	Sampling and Assaying.	Freight and Hauling.	All Others Including Supplies.	Totals.
1878..				\$97 81	\$97 81
1879..				191 18	191 19
1880..	\$2,955 60	\$11 80	\$158 10	2,875 64	5,995 34
1881..	15,292 48	592 03	2,372 33	7,047 30	25,204 37
1882..	20,504 37	4,046 86	17,619 52	11,844 14	53,414 89
1883..	4,350 11	976 86	2,001 10	1,276 70	8,606 77
	\$43,102 56	\$5,627 55	\$22,046 05	\$22,832 87	\$93,510 37

"No work upon the property, other than resetting the stake thereof, and taking care of it, was done by defendants until 1880.

"(4) The total number of tons of ore extracted by defendants and their said predecessors in interest is three thousand two hundred and fifteen (3,215). The expenditure which directly contributed to the extraction of said ore, and which, if the location of the ore bodies had been known in advance of the developing work, would have sufficed to extract and raise said ore to the surface, and with the aforesaid expenditure, for hauling freight, sampling, and assaying, to convert the same into moneys received therefor as aforesaid, is eight dollars per ton, and, for said 3,215 tons, \$25,720.

"(5) Not included in the foregoing, Joseph A. Jennings, one of the defendants, rendered services as superintendent, and in assisting in the working and developing of

said property, from December 1, 1879, to October 1, 1880, 10 months, and from October 15, 1882, to May 1, 1893, 6½ months,—in all, 16½ months,—and said services were worth \$200 per month, making in the aggregate \$3,300. Isaac Jennings, another defendant, rendered services as superintendent in the same business from January 1, 1881, to October 15, 1882, 21½ months, and said services were worth \$150 per month, aggregating \$3,225.

“(6) The expenditure not connected with the extraction of ore was made principally in an endeavor to trace an ore or vein connection from said property into adjoining mining claims, the Climax and Rebellion. All the work done was reasonably adapted to the developing of the property, and to the probable enhancement of its value.”

The referee finds that the defendants received for ores extracted from the mine, rents, and royalties, the sum of \$78,077.23, and that they expended in and about working, improving, and developing the property, and for extracting, freighting, and selling ores therefrom, including the sum paid for the certificate of purchase, and the services of Joseph and William Jennings, the sum of \$100,899. In these expenditures the referee included \$25,720 paid directly for the extraction of the ore, and for the hauling, freighting, sampling, and assaying necessary for the conversion of the ore into money. The defendants having taken possession of the mine with the consent of the plaintiff, and having worked it in good faith, they were entitled to compensation for all reasonable expenditures for the preservation, development, and permanent improvement of the property, to the extent that its value was enhanced thereby. Referee Sprague made no finding as to these expenditures. Referee Marshall found that the expenditures made in running the north tunnel did not add to the value of the property. He found that this tunnel cost \$10 per foot, and that it was run 1,000 feet.

The testimony, as we think, warrants the conclusion that the tunnel and drifts connected therewith were 1,500 feet, and that \$15,000 should have been deducted.

There are a number of expenditures in the Sprague report, aggregating \$22,733.09, designated "all other supplies." How much of these supplies was used when prosecuting work that did not enhance the value of the property, we cannot know definitely. We must infer that some of it was. It also appears that a number of men were employed five weeks to hold possession of the north tunnel,—at one time, as many as 20. It is reasonable to infer that they were paid. If so, that expenditure was for the possession of the rejected tunnel, and should have been disallowed. If we allow the sum of \$7,822 for supplies used in prosecuting work that did not enhance the value of the property, and for the men in defending the tunnel, the receipts equal the expenditures. Referee Marshall's mode was to deduct the payment for work that did not enhance the value of the property from the entire expenditures. While the court required strict and definite proof of the expenditures not directly contributing to the extraction of the ore, but enhancing the value of the property, the conclusion reached by either course is very unsatisfactory. The line between the expenditures that enhanced the value of the property and those that did not is exceedingly difficult to draw from the evidence. The probabilities are that the court excluded some expenditures that should have been allowed, and that the referee included too much. It is certain that the property was thought to be of little value when the defendants took charge of it, and that it sold for \$50,000 at the time they ceased to operate it. We are unable to find from the evidence a balance to either party. With respect to interest, it appears that the receipts increased with the



expenditures, and conversely, and that interest should not be allowed to either side.

The case is remanded to the court below, with directions to that court to make its findings conform to the above conclusions, and to enter a decree on the findings, when so changed, giving the property described in the complaint to the plaintiff, and authorizing a suitable person, as commissioner, to transfer the title to the plaintiff by a sufficient deed, and requiring the respective parties to pay their own costs, so far as they have not already been apportioned or assessed. The costs of this appeal are assessed to the respective sides in equal proportions.

BARTCH and MINER, JJ., concur.



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SIDNEY STEVENS ET AL., APPELLANTS, *v.* SOUTH  
OGDEN LAND, BUILDING & IMPROVEMENT  
COMPANY ET AL., RESPONDENTS.

CORPORATIONS—OFFICERS—ACTION FOR FRAUD—PARTIES—RECEIV-  
ERS.

1. When the same persons, officers of several corporations, form a fraudulent design to use the property and credit of such corporations for their own advantage, to the injury of the other stockholders, and do fraudulent acts in carrying out such design, all the parties affected by such acts are proper parties to a complaint based upon such fraudulent design. The persons perpetrating the fraud, and all others whose gains or losses are traceable thereto, are proper parties to an action based upon fraud.

2. When a fraudulent conspiracy is the common point of litigation, the conspirators and all persons affected by the fraud are proper parties to a suit based upon it.
3. When the business of corporations is mismanaged, and their property is misappropriated by their officers, and such mismanagement and misappropriation is likely to continue, courts of equity will appoint receivers for them.

(No. 736. Decided December 9, 1896.)

Appeal from the Second district court, Weber county, Hon. H. H. Ralapp, *Judge*.

Action by Sidney Stevens and others against the South Ogden Land, Building & Improvement Company and others, to set aside conveyances and for the appointment of a receiver. From a judgment sustaining the demurrer to the complaint, plaintiffs appeal. *Reversed*.

*L. R. Rhodes*, for appellants.

*Evans & Rogers*, and *A. G. Horn*, for respondents:

Sec. 3220 Compiled Laws '88, provides that certain causes of action may be united in the same complaint, but they all must belong to one only of certain classes, *and must affect all the parties to the action and must be separately stated*. The California code is the same. III Deering's Annotated Code, sec. 427 and note.

If the pleading does not conform to this requirement a demurrer will lie. *Nev. Canal Co. v. Kidd*, 43 Cal. 180; *White v. Cox*, 46 Cal. 169.

This ground of demurrer is well taken. *Bryce Gray v. Rothschild*, 112 N. Y. 668; *Johnson v. Kirby*, 65 Cal. 482.

We respectfully contend that as each defendant company is a separate and distinct legal entity, and has no interest in the controversies relating to the other defendant companies, there was a misjoinder of parties defend-

ant as set out in the demurrer. Bliss Code Plead., § 110 and 110a; Story Eq. Plead., § 271 to 278; *Preshaw v. Dee*, 6 Utah 360; *Bryce Gray v. Rothschild*, 112 N. Y. 668.

ZANE, C. J.:

The court below having sustained a demurrer to the complaint, and plaintiffs having failed to amend, the court entered a judgment dismissing the action, from which the plaintiffs have taken this appeal.

The complaint contains numerous allegations, among which are the following: That the South Ogden Land, Building & Improvement Company was incorporated on the 18th day of April, 1892, with authority to buy and sell real estate, build roads, parks, hotels, railways, boulevards, pleasure resorts, and do a general contracting and building business, to construct water ditches, canals, aqueducts, reservoirs, and lay and construct water works, and to build power dams for propelling machinery, and everything necessarily incident to the transaction of such business; that the business was required to be conducted according to the articles of incorporation, and its by-laws; that the number of shares in the company were 5,000, of which Sidney Stevens subscribed for 1,646 shares, Sidney O. and Frank J. Stevens 10 shares each, Solomon C. and William J. Stephens 1,666 shares each, and David Kay 2 shares; that the capital stock of the corporation consisted of numerous lots and tracts of real estate, described in the complaint; that it was further provided that Sidney Stevens, William J. Stephens, Solomon C. Stephens, Sidney O. Stevens, Frank J. Stevens, and David Kay should be directors until the first Monday in May, 1893, and until the election and qualification of their successors; that Sidney Stevens should be president, Sidney O. Stevens secretary, Frank J. Stevens treasurer, and William J. Stephens vice president. It was further alleged that the

South Ogden Mercantile Company, on the same day, was also incorporated; that the object of this incorporation was a wholesale and retail mercantile business, and the acquisition of such land as might be essential to the business; that the capital stock of the corporation was divided into 250 shares, of which Sidney Stevens subscribed for 73 1-3 shares, Frank J. and Sidney O. Stevens 5 shares each, William J. and Solomon G. Stephens 83 1-3 shares each; that the officers of the corporation consisted of five directors, president, vice president, secretary, and treasurer; that, until the meeting of the stockholders on the first Wednesday in May, 1893, and the election and qualification of officers thereto, the board of directors should be Sidney Stevens, Solomon C. and W. J. Stephens, and Frank J. and Sidney O. Stevens; that Sidney Stevens should be president, William J. Stephens vice president, Sidney O. Stevens secretary, and Frank J. Stevens treasurer; that the capital stock consisted of real estate, described in the complaint. The plaintiffs further alleged that the South Ogden Clay & Manufacturing Company was also incorporated on the same day; that the purpose of the corporation was the manufacture of brick, tiling, sewer pipe, pottery, the erection and operation of flouring mills, the manufacturing of tinware, the erection and operation of woolen mills, manufacture of wagons and other vehicles and farming implements, and the erection and operation of iron foundries, glass factories, and manufacture of wooden wares; that the capital stock of this corporation was divided into 5,000 shares, of which Solomon C. and W. J. Stephens subscribed 1,666 shares each, Sidney O. Stevens 1,661 shares, and Frank J. and Sidney Stevens 2 shares each; that the officers of the corporation consisted of a board of five directors, a president, vice president, secretary, and treasurer; that until the meeting of the stockholders on the

first Tuesday in May, 1893, and the election and qualification of officers, the directors should be Solomon C. and William J. Stephens, and Sidney O., Frank J., and Sidney Stevens; that said Solomon C. Stephens should be president, Sidney Stevens vice president, Sidney O. Stevens secretary, and Frank J. Stevens treasurer; that the capital stock consisted of all the title and interest of William J. Stephens and Solomon C. Stephens to and in a certain option contract for certain lands described in the complaint. Plaintiffs also alleged that, in May, 1892, the South Ogden Water Company was incorporated, with authority to purchase water, to construct waterworks for South Ogden and a portion of Ogden City, and also to acquire and hold the necessary real and personal property, and to sell the same when necessary or desirable; that its capital stock was divided into 5,000 shares, of which Sidney Stevens subscribed for 1,646 shares, Solomon C. and William J. Stephens 1,666 shares each, Sidney O. and Frank J. Stevens 10 shares each, and David Kay 2 shares; that the capital stock of this corporation consisted of the right to the waters of certain creeks and reservoirs mentioned in the complaint. The plaintiffs further alleged that the four corporations named were organized to prosecute one enterprise, and that they were to be, in effect, subject to one management, and that their business became so intermingled and connected that it was necessary to make them all parties to the same action; that all of the subscribers still own their stock, with the exception of one share assigned to John J. Hill, and a few shares assigned to Paul Beus. Plaintiffs further allege that Sidney Stevens turned over to the South Ogden Mercantile Company, soon after its organization, in payment for his stock, a stock of goods of the value of \$14,000, and that he placed to the credit of the South Ogden Land, Building & Improvement Company \$10,000

in payment for stock issued; that, after the organization of said corporations, Solomon C. Stephens became general manager of the business of the South Ogden Clay & Manufacturing Company, and William J. Stephens of the South Ogden Land, Building & Improvement Company, and Sidney O. Stevens of the business and affairs of the South Ogden Mercantile Company; that Solomon C. Stephens and William J. Stephens represented to these plaintiffs that they were interested in a large number of building contracts in various parts of the city of Ogden, Park City, Heber City, and other places in Utah territory, and that such business had been entered into by them under the firm name of Stephens Bros., but that they would turn over to the South Ogden Land, Building & Improvement Company all benefits arising from said contracts, and that the goods and trade connected with said building operations should go to the benefit of the South Ogden Mercantile Company, and that all pay which they were to receive for the construction of such buildings should be paid into the treasury of the said South Ogden Land, Building & Improvement Company, in consideration of certain credits, to which proposal plaintiffs agreed; that thereupon William J. and Solomon C. Stephens began to use, in such building operations, the \$10,000 of credit in favor of the South Ogden Land, Building & Improvement Company placed there by plaintiff Sidney Stevens, and also began to use the \$14,000 worth of goods and merchandise of the South Ogden Mercantile Company, and they also began to purchase, from various firms in Ogden City and the East, goods, wares, and merchandise, to be used by them in and about said building operations; that, about the 1st day of September, 1892, plaintiffs ascertained that William J. and Solomon C. Stephens had drawn the full amount of the \$10,000 placed to the credit of the South Ogden Land, Building & Improvement

Company, and that they had incurred obligations against that company to the extent of about \$17,000, all of which, to the amount of about \$20,000, had been used by S. C. and W. J. Stephens in the execution of said contracts, and, in addition thereto, they drew from the stock of merchandise about \$10,000, and, besides this amount of about \$30,000, the said S. C. and W. J. Stephens had also contracted debts against the South Ogden Land, Building & Improvement Company to the amount of about \$17,000; that, upon their representations, the last-named company borrowed the sum of \$15,000, and gave mortgages to secure the same on all of the property of the four corporations; that the said S. C. and W. J. Stephens refused to turn over any part of the proceeds to said companies, or either of them, and by means of force and violence took possession of the offices of the companies, and ejected plaintiffs therefrom, and held the same. The plaintiffs further alleged, in their complaint, that said W. J. and S. C. Stephens have a majority of the stock in each of the four corporations; that they held elections of stockholders, and did not elect plaintiffs, or either of them; that the directors elected, intending to defraud plaintiffs, and to render their stock in the companies absolutely worthless, and for the purpose of transferring, in the end, all of the property of the said corporations to their own private use, entered upon the books of said corporations various false entries, by which said Solomon C. and William J. Stephens were credited with false and fictitious credits; that they caused to be recorded, on the records of Weber county, numerous mortgages and trust deeds, in favor of said S. C. and W. J. Stephens, on the property of said corporations, while they were indebted to the companies, and that they are still so indebted; that said mortgages and deeds of trust were given without any consideration, and upon a fraudulent understanding and conspiracy

between said directors; that the defendants have sold the property of the said companies, and the proceeds thereof have been converted to the use of S. C. and W. J. Stephens. The plaintiffs allege numerous other fraudulent designs and conspiracies of the defendants, to the injury of the plaintiffs, by means of which the four companies aforesaid have apparently been denuded and divested of their property, so that the purposes of their creation cannot longer be prosecuted and carried out. And, finally, the plaintiffs allege that, by means of the conspiracies and acts alleged in their complaint, they have been defrauded of \$36,000, and that they never received anything from their investments or said corporations, and, further, that the defendants refuse to consult with plaintiffs, or to pay any attention to their requests and demands, or to respect their rights. The plaintiffs prayed the court to appoint a receiver, with power to take possession of all the property, books, and accounts due or to become due to said corporations, and with authority to bring all necessary suits to obtain the possession of the books, property, and evidences of indebtedness belonging to them, and to set aside all fraudulent conveyances, and require accountings, and, generally, to take charge of and wind up the business thereof.

Defendants demurred to the plaintiffs' complaint on two principal grounds: (1) Because it was multifarious,—that distinct and independent matters were blended; (2) that there was a misjoinder of parties as co-defendants. The immediate object sought by the complaint was the appointment of a receiver for the four corporate defendants, and, ultimately, compensation for the loss caused by the mismanagement and fraud of the defendants in conducting the business, disposing of the property, and using the credit of the said corporate defendants. It appears from the complaint that all the other parties to



the action were owners of stock issued by the respective corporations, and that they were organized and intended to be used as instrumentalities in the prosecution of a general design,—that it was believed the enterprises contemplated could be more successfully carried out by the four corporations than by a less number. It further appears that a fraudulent design and conspiracy of the defendants, who are natural persons, caused losses to the corporate defendants, as well as the plaintiffs; that the defendants perpetrating the fraud affected injuriously all the other parties; that the losses of the other parties are traceable to and centered in the fraud of the natural defendants. The plaintiffs base the right to the remedy they ask on that fraud.

Assuming the allegations of the complaint to be true, as we must for the purposes of the demurrer, the defendants William J. Stephens, Solomon C. Stephens, David Kay, John J. Hill, Paul Beus, and J. O. Stevens formed a fraudulent design, and entered into a conspiracy to use the property and credit of the corporations named for their own benefit, to the injury of the other parties; and, in prosecuting that purpose, they did a number of acts by which the interests and rights of the other parties were affected. Therefore, the parties doing the fraudulent acts, and all other persons, natural or legal, were proper parties to the action to investigate the entire fraud, and the transactions connected therewith, and to ascertain the respective rights and interests of the parties, that such orders and such a decree might be made as would secure the rights and interests of all those affected by the fraud; and this, though some of the defendants might have separate and distinct defenses. The ends of distributive justice manifested by this complaint call for a liberal application of the flexible principles of equity. The gist of the action, as set forth in the

complaint, is the fraud and mismanagement of defendants William J. Stephens, Solomon C. Stephens, J. O. Stevens, David Kay, John J. Hill, and Paul Beus in controlling, disposing of, and appropriating the property of the corporations named, transacting their business, and using their credit, by which the rights and interests of all the other parties were affected. In this there is one common point of litigation. That being so, they were all proper parties; and, for the same or similar reasons, the complaint cannot be regarded as multifarious. *North v. Bradway*, 9 Minn. 183 (Gil. 169); *Donovan v. Dunning*, 69 Mo. 436; *Fellows v. Fellows*, 4 Cow. 682; *Bobb v. Bobb*, 76 Mo. 419; *Williams v. Bankhead*, 19 Wall. 563; Phil Code Pl. § 453; Cook, Stock, Stockh. & Corp. Law, § 738; Story, Eq. Pl. (9th Ed.) § 539.

It clearly appears, from the allegations of the complaint, that the natural persons named as defendants were directors and officers of the four corporations mentioned, and that they so mismanaged the business of the companies as to cause the plaintiffs, who were stockholders, great loss, and that they will sustain further loss unless a receiver is appointed. We are of the opinion that the order sustaining the demurrer and the judgment dismissing the action were erroneous. The judgment appealed from is reversed, and the cause is remanded, with directions to set aside the order sustaining the demurrer.

BARTCH and MINER, JJ., concur.

14 UTAH—16

GEORGE A. EVERETT ET AL., APPELLANTS, v. J. C.  
TAYLOR ET AL., RESPONDENTS.

SALE—DELIVERY—CONTINUOUS POSSESSION.

1. A vendor delivered to plaintiffs enough wool at 9 cents per pound to pay a debt of \$505, which he owed them, and they moved it a considerable distance, to the opposite end of the shed, and stored it; and afterwards the vendor, upon an agreement with the plaintiffs, employed a man who owed him to haul the wool to the station, to be shipped in plaintiffs' names. *Held*, that this was *prima facie* evidence of sale, delivery, and continuous possession, and that the court erred in instructing the jury to find for defendants on the ground that there was no evidence of actual delivery and continuous possession.
2. Under section 2837, Comp. Laws 1888, a sale of goods must be accompanied with delivery within a reasonable time, and followed by an actual and continuous change of possession. The change of possession must be actual, not constructive, or merely colorable; and it must be continuous, not merely a delivery and surrender back.
3. After a sale and delivery of the goods, the vendee may appoint the vendor his trustee to hold them, or his agent or employé to hold or dispose of them.

( No. 744. Decided Dec. 11, 1896.)

Appeal from the First district court, Territory of Utah.  
Hon. H. W. Smith, *Judge*.

Action by George A. Everett and others against J. C. Taylor and others. Judgment for defendants, and plaintiffs appeal. *Reversed*.

This action was brought by the plaintiffs against the defendants to recover damages in consequence of the

alleged wrongful taking and conversion of 7,000 pounds of wool of the value of \$700. Defendants filed an answer, in which they alleged the wool belonged to one J. T. Stewart, and that it was seized and converted under an execution against him upon a judgment for \$642.85 in favor of defendant J. C. Taylor, and that the other defendants were officers who executed the writ. It appears from the evidence upon the trial of the case before the court and jury that the plaintiffs had performed labor for Stewart in herding a large flock of sheep under an agreement that they were to be paid in wool, and that he owed them \$505; that the wool was sacked, and enough of it at the market price (9 cents per pound) turned over to them by Stewart to amount to that sum; that they moved the sacks about 100 feet, to the other end of the shed, and piled them up by themselves; that Stewart went home to Kanab, and the plaintiff Wallace, acting for the other plaintiffs, remained at the sheds a day, and then went back to the flock. It appears further that Stewart agreed with plaintiffs that Mr. Jolly, who was indebted to him, should haul the wool to Salina,—the railroad station,—and that it should be shipped from there in Wallace's name, for the plaintiffs, to the Eastern market. While the wool was in Jolly's wagon on the way to Salina, it was seized at the request of Taylor by the officers on the execution in his favor. Upon the foregoing facts, on motion of the defendants the court instructed the jury to return a verdict for the defendants on the ground that there was not sufficient proof of delivery, to which instruction the plaintiffs at the time excepted. The jury having returned a verdict for defendants, the court entered a judgment thereon against the plaintiffs, from which judgment the plaintiffs have taken this appeal, and they assign the instruction of the court and the judgment thereon as error.

*Samuel A. King*, for appellant:

*Thurman & Wedgwood*, for respondents:

ZANE, C. J.:

The fact that the vendor, Stewart, sacked the wool, and separated it from the rest, and actually gave the plaintiffs possession of it at its market price, and that they moved it a hundred feet, and piled it up by itself, certainly was evidence of actual delivery. Their possession appears to have been continuous afterwards. There was no evidence that these acts were not in good faith,—that they were merely colorable. It certainly was for the jury to determine whether the possession was actual or colorable merely, and whether it was continuous. Section 2837, Comp. Laws Utah 1888, relating to such sales, is as follows: "Every sale made by a vendor of goods or chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by a delivery within a reasonable time, and be followed by an actual and continued change of the possession of the thing sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor, or assignor, or subsequent purchasers in good faith." This section requires the sale to be accompanied with delivery within a reasonable time, and followed by an actual and continued change of possession, or with an understanding to that effect. The change of possession must be actual, not merely constructive or colorable. And the possession must be continuous in the purchaser, not merely a delivery and surrender back. The possession may be delivered by an agent or employé of the vendor and received by such employé or agent, and such agent or employé may continue to hold the property for his principal. After such possession, the vendee may

appoint the vendor to hold the property for him as his trustee or agent, or he may make him his employé. Such appointment or employment must be in good faith. Such appointment or employment may be regarded as a suspicious circumstance, and may be considered by the jury, with all the other evidence, in determining whether the possession was taken and held in good faith. While the arrangement between Stewart and the plaintiffs for the transportation of the wool by Jolly may be a suspicious circumstance, it should not have been regarded as conclusive evidence of fraud. The jury should have been permitted to consider it with all the other competent, relevant, and material evidence. *Godchaux v. Mulford*, 26 Cal. 316; *Wilson v. Hooper*, 36 Am. Dec. 366; *Stevens v. Irwin*, 15 Cal. 503; *Farr v. Swigart*, 13 Utah 150. We are of the opinion that the court erred in charging the jury to find the issues for the defendants. Judgment reversed, and cause remanded.

BARTCH and MINER, JJ., concur.

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V. M. C. SILVA, APPELLANT, v. W. L. PICKARD ET AL., RESPONDENTS.

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RES ADJUDICATA—DECISIONS OF THE TERRITORIAL SUPREME COURT.

1. This was a partnership settlement, tried before a referee, and taken to the supreme court of the late territory, where the question of the exclusion of certain testimony, and the sufficiency of the evidence, were passed upon. On a second trial the referee adhered to the decision of the territorial supreme

court which on this appeal the appellant contends is not binding, because that court was not a court of last resort, inasmuch as the case might have been taken to the supreme court of the United States, the amount involved being over \$5,000. *Held*, that a decision of the supreme court of the Territory of Utah is *res adjudicata*, and that the principles and questions there adjudicated on an appeal are binding, and will not be reviewed as between the same parties and their privies on a subsequent appeal in the same case. The law so declared controls all further proceedings in the cause until the termination.

2. *Held*, also, that a finding of fact made upon conflicting evidence will not be disturbed if there is evidence to sustain it.

(No. 693. Decided Oct. 27, 1896.)

Appeal from the Third district court, Territory of Utah.  
Hon. S. A. Merritt, *Judge*.

Action by V. M. C. Silva against W. L. Pickard and H. Cohn & Co. for a partnership accounting. From the judgment, Silva and Pickard appeal.

*Sutherland and Murphy and Andrew Howat*, for appellants.

*Marshall & Royle and Dickson, Ellis & Ellis*, for respondents.

No briefs were filed in this case.

RITCHIE, District Judge:

This suit is for a settlement of partnership accounts. In 1883, the plaintiff, as one partner, the defendant W. L. Pickard, as another, and the defendant H. Cohn & Co., as a third partner, constituted for a year the Territorial Wool Association. There was a renewal of that partnership afterwards, until and including 1887. The concern was so organized and continued for the business of buying wool in Utah, and selling it in Boston. Each year it

had a contract with the Massachusetts Loan & Trust Company. By their contract entered into in 1887, the Boston company were to pay the drafts of the wool association drawn for 12 cents a pound of wool shipped to the company. The drafts were to be accompanied with bills of lading of the shipments. The wool so shipped was security for the advance and certain expenses incident to the storage and care of the wool. The association had an agent in Boston to look after the wool, and secure buyers for it. The partners in Utah did not make joint purchases. Each bought and shipped in his own name to the Boston correspondent, and received the draft of the association for the advance of 12 cents a pound; the agent in Boston keeping the account of the partners between themselves, the account of their several shipments, and their drafts for advances. The business of the wool association in 1886 was not prosperous. The wool bought that year remained mostly on hand in 1887, and for that reason the accounts between the partners were not settled when the season opened in the latter year. The wool association continued to buy wool through the season of 1887. \*The business of that year was not profitable. The wools were not sold, and the accounts with the Massachusetts Loan & Trust Company closed until about February, 1889. At that time the wool association received as the net balance due it from the Boston correspondent, as the result of its wool business in 1886 and 1887, \$27,804. That sum, and that alone, constituted the assets of the wool association to be divided. The company did not renew the partnership to do any new business after the close of 1887. After receiving a statement of their unsettled transactions, a dispute arose as to the rights of the several partners. Pending the efforts to settle, the money, by common consent, was placed, March 24, 1889, in the hands of F. Auerbach, for safe-keeping, at an



agreed interest of 6 per cent per annum. The testimony is conflicting as to what was the dispute between the partners, and, being unable to agree, at length, in 1892, this suit was begun. The plaintiff, in his complaint, alleges, and defendant Pickard, in his pleading, admits, that on the 4th day of May, 1887, the association, at a meeting then held, adopted a resolution that it would buy only a million pounds of wool during that year, and that each member should be limited to one-third of that amount. H. Cohn & Co., in their pleadings, denied the adoption of that resolution, or any agreed limitation, and alleged such consent to and acquiescence in the purchases that were made as should have the effect of a waiver of any objection. These are the important issues in the case. The second trial of this suit was had before Robert Harkness, as referee, and the report of the referee was confirmed by the court, and decree rendered accordingly, adverse to the claims of Silva and Pickard, who appealed. The errors relied upon for a reversal of the decree are: First, exclusion of the testimony of B. G. Raybould; second, insufficiency of the evidence to justify the fourth and sixth findings of fact made by the referee.

Discussing the first, we are met at the outset with the proposition from the respondents that, in excluding the evidence proffered of the witness Raybould, the referee simply followed the decision of the supreme court of the territory of Utah on a former appeal of this case (37 Pac. 86); that the question of its admissibility was then presented, and decided adversely to the view taken by the appellants. But it is contended on behalf of the latter that the territorial supreme court was not a court of last resort in this case, as, the amount involved being over \$5,000, either party might have appealed to the supreme court of the United States, and therefore the decision of the territorial supreme court is not the law of the case;

and that on a second appeal that court might have corrected any error which then appeared to have been committed in the decision on a former appeal; and, by the same reasoning, that this court can now correct any such error.

The rule invoked upon behalf of the respondents is stated by Mr. Justice Field, now of the supreme court of the United States, speaking then for the supreme court of California, in the case of *Leese v. Clark*, 20 Cal. 417, in the following language: "A previous ruling of the appellate court upon a point distinctly made may be only authority in other cases, to be followed and affirmed, or to be modified and overruled, according to its intrinsic merits. But, in the case in which it is made, it is more than authority. It is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves. Such has been the doctrine of this court for years, and, after repeated examinations and affirmations, it cannot be considered as open to further discussion. *Dewey v. Gray*, 2 Cal. 377; *Clary v. Hoaglund*, 6 Cal. 687; *Gunter v. Laffan*, 7 Cal. 592; and *Davison v. Dallas*, 15 Cal. 82. Nor is the doctrine peculiar to this court. It is the established doctrine of the supreme court of the United States, and of the supreme courts of several of the states. [Citing, among other cases, *Sibbald v. U. S.*, 12 Pet. 491; *Bridge Co. v. Stewart*, 3 How. 413.] And the reasoning of the doctrine is obvious. The supreme court has no appellate jurisdiction over its own judgments. It cannot review or modify them after the case has once passed, by the issuance of the remittitur, from its control." The rule is also stated as follows: "Where a decision is given by a court of ultimate appeal in a case, the decision must be regarded as conclusive in that particular case. \* \* \* In the same case any ruling is final; in a different one it is only the precedent estab-

lished; and, while the courts are reluctant to disregard previous decisions in similar cases, there may be a variety of reasons which will cause them to do it. This general distinction exists, and must be recognized, no matter how palpable the error or unfortunate the circumstance. It is one over which the court itself has no control." 23 Am. & Eng. Enc. Law 33, citing many other cases. No doubt is raised but that such is the rule, but it is said to be inapplicable to this case. Is it applicable to the decision of an intermediate court of appeal, as well as to one of a court of ultimate appeal? An examination of the principles upon which the doctrine of the law of the case is found furnishes an answer to the inquiry. "Appellate courts have not, in general, the power to review their own decisions after the time for rehearing has expired. The exercise of such a power involves original jurisdiction, and appellate courts are limited to the review of the judgments of inferior tribunals. The doctrine of *res adjudicata*, and the principles upon which it rests, apply, therefore, to appellate judgments. The principles and questions adjudicated on an appeal are binding, and will not be reviewed as between the same parties and their privies on a subsequent appeal in the same cause. The law so declared controls all further proceedings in the cause until the termination." 2 Enc. Pl. & Prac. 373. "Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate courts. The superior courts have no power to review their decisions, whether in a case at law or in equity. \* \* \* No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes, \* \* \* or to reinstate a cause dismissed by mistake, \* \* \* from which it follows that no change

or modification can be made which may substantially vary or affect it in any material thing. Bills of review in cases of equity, and writs of error, *coram vobis* at law, are exceptions." *Sibbald v. U. S.*, 12 Pet. 488. "\* \* \* The final judgment of the highest court upon a question of law arising between the parties to an action on a given state of facts establishes the rights of the parties to that controversy, and is a final determination thereof, and, like a final judgment in any other case, estops the parties thereto from afterwards questioning its correctness. This court has no appellate jurisdiction over its own judgments, and such judgment, therefore, constitutes an estoppel or record of the highest character, and is conclusive between the parties as to the matters adjudged." *Klauber v. Car Co.*, 98 Cal. 107. So, on the other hand, if, upon the construction of the contract supposed, this court reverses the judgment of the court below, and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the new trial. It is just as final to that extent as a judgment directing a particular judgment to be entered is as to the character of such judgment. The court cannot recall the case, and reverse its decision, after the remittitur is issued. It has determined the principles of law which shall govern, and, having thus determined, its jurisdiction in that respect is gone. *Young v. Frost*, 1 Md. 394; *McClellan v. Crook*, 7 Gill. 338; *Leese v. Clark*, 20 Cal. 417; *Hayne*, New Trial & App. § 291.

This is the reasoning upon which the rule is based in courts of last resort, both in Europe and America. 3 Dow, 157; *Himely v. Ross*, 5 Cranch, 313; *Bridge Co. v. Stewart*, 3 How. 424-426; *Sibbald v. U. S.*, 12 Pet. 488; 22 Cent. Law J. 497, note, and 25 Cent. Law J. 297, note, and many cases cited in the notes referred to; *Elliott*, App. Proc. § 578. See, also, *Pledge v. Carr* [1895] 1 Ch.

51; *The Vera Cruz*, 9 Prob. Div. 96, 98. It has been adopted by this court. *Krantz v. Railway Co.*, 13 Utah 1; *Brine v. Jones*, 13 Utah 440.

The jurisdictions in which provision has been made for successive appeals, at each step to a higher tribunal, are not numerous. In England, before the judicature acts, writs of error from the superior common-law courts into the exchequer chamber, and thence into the house of lords, and appeals from the high court of chancery to the court of appeals in chancery, and thence into the house of lords, furnish examples of such procedure; and at the present time appeals lie from the various divisions of the high court of justice to the court of appeal, and thence to the house of lords. Since 1891 similar provisions have existed with reference to certain classes of cases in the appellate procedure in the federal courts. In New York, appeals may be taken from the special term of the supreme court to the general term, and thence to the court of appeals. In Illinois certain classes of cases may be reviewed, first, in the appellate court, and then in the supreme court. Recently, other states have adopted similar systems, but, in those named, they have existed many years. A careful search among the decisions in these jurisdictions reveals no support for the position taken by the appellant; but the rule seems to be that when an appellant ceases to pursue his appeal from one appellate court to a higher, though he might do so, the decision of the court where he sees fit to rest is a final one, within the meaning of the rule invoked by the respondents. *Metcalf v. Del Valle*, 66 Hun 627; 20 N. Y. Supp. 984; *In re Nelson*, 66 Hun 632; *Excelsior Brick Co. v. Village of Haverstraw*, 66 Hun 631; *Corn v. Rosenthal* (Com. Pl.), 22 N. Y. Supp. 700; *Morse v. Hawley*, 69 Hun 614; *Whitesides v. Cook*, 43 Ill. App.

183; *Ogle v. Turpin*, 8 Ill. App. 453-458; *Steele v. Thompson*, 38 Mo. App. 312. See, especially, *Lackland v. Smith*, 75 Mo. 307. The cases in this court already cited—*Krantz v. Railway Co.*, 13 Utah 1, and *Brim v. Jones*, 13 Utah 440—do not present the question in the precise form in which it appears in this case, but the reasoning therein leads to the same result. We are precluded by this doctrine from a re-examination of the question of the admissibility of the evidence offered.

The second ground upon which appellant prays for a reversal of the decree and order is the insufficiency of the evidence to justify the fourth and sixth findings of fact, which were to the effect that no agreement limiting the purchase was made, and, even if it had been made, that the subsequent conduct of the parties amounted to a waiver of the limitation. Again, we are met by a rule which bars an examination of the evidence in question. There being substantial conflict, this court cannot reverse the decree and order denying a new trial, upon the ground of the insufficiency of the evidence to justify the findings complained of. In cases where judgment has been rendered since January 4, 1896, the date when the state constitution went into effect, this question will have to be considered in the light of the provisions contained in section 9 of article 8 of the constitution, providing that "in equity cases the appeal may be taken on questions of both law and fact." But the constitutional provision has no application in this case. The controlling rule is stated by the supreme court of California: "Our system does not contemplate any distinction in this respect (between cases at law and in equity), and there is no propriety in making any under it. Under the old chancery practice, the testimony was taken by deposition, generally before a master or a commissioner, and reduced to writing. When the testimony had all been filed, the

case was argued upon it before the proper court; and, on appeal, the entire evidence was before the chancellor or appellate court, in the same form in which it was presented to the court below. The appellate court had the same means of determining the credibility of the witnesses as the court below. But it is not so under our system. Now, the witnesses are examined in open court, and only brief minutes of the testimony taken, as in actions of law. The record is brought to this court by a statement on motion for new trial in the same mode as in actions at law. The court below is possessed of all those aids necessary to enable it to give due credit to every item of testimony which is accessible to the judge who tries an action at law, and which, from the nature of things, is inaccessible to this court. For these reasons, if for no other, there would be no propriety in making a distinction in the two classes of cases. But it is enough to say that the principles governing the practice are already settled. *Gagliardo v. Hoberlin*, 18 Cal. 395; *Duff v. Fisher*, 15 Cal. 379; *Green v. Butler*, 26 Cal. 599; *Allen v. Fennon*, 27 Cal. 69 and cases cited." *Doe v. Vallejo*, 29 Cal. 390.

The judgment and order of the court below denying the motion for a new trial must be affirmed.

ROLAPP, District Judge, concurs.

BARTCH, J., concurs in the result.

SIDNEY STEVENS, APPELLANT, v. W. J. STEPHENS  
ET AL., RESPONDENTS.

BURDEN OF PROOF—INSTRUCTION TO JURY.

Where, in an action upon an account, the defendant, in his answer, sets up affirmative matter upon which he relies to release himself from the plaintiff's claim, the burden is upon him to establish his defense; and in such case it is error for the court to charge the jury that the burden of proof is upon the plaintiff, without stating to them the position which the defendant occupies respecting the proof.

(No. 718. Decided Oct. 15, 1896.)

Appeal from the Second district court, Weber county.  
Hon. H. H. Rolapp, *Judge*.

Action by Sidney Stevens against W. J. Stephens and S. C. Stephens, doing business under the firm name of Stephens Bros. Verdict for defendants and plaintiff appeals. *Reversed*.

*L. R. Rhodes*, for appellant.

*E. M. Allison, Jr.*, for respondents.

BARTCH, J.:

This is an action upon an account for goods sold and delivered. At the trial the jury returned a verdict of "No cause of action," and this appeal is from an order denying a motion for a new trial. It is alleged in the complaint, substantially, that the defendants are co-part-



ners doing business under the firm name of Stephens Bros., and are indebted to the plaintiff in the sum of \$2,277.65, balance due upon an account for goods, wares, and merchandise sold to them at their special instance and request, at Ogden City, between May 1 and September 5, 1892, and that the same became due and payable on the last-named day. The answer denies specifically all the allegations of the complaint, and then, in substance, alleges affirmatively that, when goods in question were bought, the plaintiff and the defendants were directors in four corporations, the plaintiff having also been president of three of them, and that the defendants were the active business managers of said corporations; that as such managing agents they ordered the goods in question for said corporations; that at the time the plaintiff furnished said goods he knew they were being furnished for the corporations, and furnished them with the intent to aid them; and that no part of them was received by the defendants or ordered by them, except as such agents and managers. At the trial, counsel for the plaintiff requested the court to rule that under the pleadings the burden of proof was on the defendants, but the court held that the burden of proof was on the plaintiff, and so instructed the jury. This action on the part of the court is set out as one of the causes of complaint. It is quite clear that both counsel and court were in error. As an abstract proposition of law, the statement of the court to the jury that "the burden of proof is upon the plaintiff, and he must establish, by a preponderance of the evidence, the material allegations of his complaint," is doubtless correct; but we are apprehensive that, under the pleadings, its application in this case, without stating the position which the defendants occupied respecting the *onus probandi*, was not only erroneous, but misleading to the jury as to the proper mode of determining the ques-

tion at issue. The plaintiff was bound to make out a *prima facie* case, but he was not bound to prove, in the first instance, that the defendants were not acting as agents when they ordered the goods. The mere fact that agency was set up in the answer raised no presumption that such a relation actually existed. Agency was made the basis to defeat the plaintiff's claim, and therefore it was incumbent upon the defendants to establish it by affirmative proof. If, in a court of justice, one undertakes to make out a case against another, or, by affirmative defense, to release him from the claim of another, the burden is on him to furnish the proof to make good his contention. Whart. Ev. §§ 356, 357. In the case at bar the *onus* was on the plaintiff to prove his case substantially as alleged. Then, when this was done, it was incumbent upon the defendants, in order to release themselves from the plaintiff's claim, to show that the goods were ordered by them as managing agents for the corporations, and sold by the plaintiff with the understanding that they were being purchased by the corporations, as alleged in the answer. The court having failed to instruct the jury properly on the question of the burden of proof, the cause must be reversed, and, this being so, we do not deem it necessary to discuss the questions upon the evidence raised in the course of the trial. The cause is reversed and remanded, with directions to the court below to set aside the order appealed from, and grant a new trial.

ZANE, C. J., and MINER, J., concur.

14 UTAH—17

PEOPLE, RESPONDENT, *v.* ANDREAS BURTLESON,  
APPELLANT.

STATUTES—REPEAL—NUISANCE—INTENT—HARMLESS ERROR.

1. Comp. Laws of Utah 1888, § 4566, which defines a public nuisance, and denounces the annoying, injuring, or endangering the comfort, health, repose, or safety of three or more persons as a public nuisance, was not impliedly repealed by sections 4, 5, c. 63, Sess. Laws 1892, amending section 2364, Comp. Laws Utah 1888, relating to "befouling waters," since section 4566 relates to and was intended to denounce and punish public nuisances in general, and is applicable whenever a nuisance affects three or more persons, while sections 4, 5, of the act of 1892 relate only to, and were intended to denounce and punish the befouling of waters of any stream used for domestic purposes by the inhabitants of any city, town or village, and leave wholly unprotected all persons who are not such inhabitants, and since an act which might constitute a nuisance under the former law might not constitute an offense under the latter.
2. Where two statutes do not relate to the same subject, and are not enacted for the same purpose, they are not repugnant to each other.
3. A witness who was not an expert was permitted to state his opinion as to a certain subject, calling for expert testimony, but upon cross examination modified his statement by limiting it to the facts of the case, and as the facts in all probability would have produced the same effect upon the jury, and the evidence outside of the objectionable statement was ample to warrant the jury in returning a verdict against the defendant, *held*, that while it was improper for the witness to state his opinion, it was not, under the circumstances, prejudicial error.
4. Where a party so uses his property as to annoy, injure or endanger the comfort, repose, health, or safety of three or more persons, his acts are unlawful, and he is liable to prosecution under section 4566, Comp. Laws Utah 1888, even though he

may be in pursuit of a lawful business, and conducting it in a reasonable and careful manner.

5. In determining the question of a nuisance under the statute, the motive or intent with which the act complained of was committed cannot be considered.

(No. 683. Decided October 23, 1896.)

Appeal from the First district court, Territory of Utah.  
Hon. W. H. King, *Judge*.

Andreas Burtleson was convicted of having committed a public nuisance, and appeals. *Affirmed*.

*Samuel A. King*, for appellant.

*A. C. Bishop*, Attorney General (*Benner X. Smith*, of counsel), for the people.

BARTCH, J.:

This is a criminal prosecution under section 4566, Comp. Laws. Utah 1888, and the defendant was charged with having committed a public nuisance by unlawfully and willfully driving, herding, and keeping about 2,000 sheep in and upon a small stream, the water of which was used for culinary and domestic purposes by the inhabitants of the town of Annabella, in Sevier county, Utah, and by rendering the said water impure, and thereby endangering the comfort and health of three persons, named in the complaint, and divers other persons, residents of said town, and using the water for said purposes. Upon conviction, and sentence to pay a fine and costs, the defendant appealed to this court.

The statute above referred to, so far as material to this decision, reads as follows: "A public nuisance is a crime against the order and economy of the territory, and consists in unlawfully doing any act, or omitting to

perform any duty, which act or omission, either: (1) Annoys, injures or endangers the comfort, health, repose or safety of three or more persons," etc. Counsel for the appellant contends that this section is in conflict with sections 4, 5, c. 63, Sess. Laws 1892, and is repealed to the extent of such conflict, and that the court erred in refusing to instruct the jury, at the close of the prosecution's testimony, to return a verdict in favor of the defendant, there being no evidence nor any claim that he had violated any provisions of the act of 1892. If this contention be correct, then the former law is repealed by the later, and this by implication, because there are no words of repeal in the act. An implied repeal will not result unless the necessary operation and effect of the new law cannot be harmonized with the necessary operation and effect of the old, or unless it is clear that the legislature intended the new law to be a substitute for the old; but such intention will not be presumed. It must appear from the context. So, in case of repugnancy, which renders the statutes irreconcilable, the former in point of time will be repealed only to the extent of such repugnancy. Sections 4 and 5 of the act of 1892, which, it is insisted, repeal the statute under which this prosecution was instituted, amend section 2264, Comp. Laws Utah 1888, relating to "befouling waters," and were enacted as subdivisions thereto. Under section 4 it is made unlawful "to dip or wash sheep in any stream, or to construct or maintain or use any pool or dipping vat for dipping or washing sheep in such close proximity to any stream used by the inhabitants of any city, town or village, for domestic purposes, or to construct or maintain any corral, yard or vat, to be used for the purpose of shearing or dipping sheep, within seven miles of any city, town or village, where the refuse or filth from said corral or yard would naturally find its way into any

stream of water used by the inhabitants of any city, town, or village, for domestic purposes." Under section 5 it is made unlawful "to establish and maintain any corral, camp or bedding place for the purpose of herding, holding or keeping any cattle, horses or sheep, within seven miles of any city, town or village, where the refuse or filth from said corral, camp or bedding place will naturally find its way into any stream of water used by the inhabitants of any city, town or village for domestic purposes." It will be noticed that section 4 is limited to sheep, and denounces and forbids the washing, dipping, or shearing of them, and maintaining any corral for that purpose, along a stream at any point within seven miles of any city, town, or village, where the refuse will naturally find its way into the stream, the waters of which are being used for domestic purposes by the inhabitants of such town, city, or village. The same may be said of section 5, except that its operation is not limited to sheep alone, but includes cattle and horses. It will further be noticed that both of these sections apply only to the inhabitants of cities, towns, and villages, and leave wholly unprotected all persons who are not such inhabitants, but live in the more isolated portions of the state, and even the very acts prohibited may, for aught that appears in the provisions of the sections, be committed with impunity without the seven-mile limit, no matter how great the nuisance may be which is thereby created. How can it be contended that an act with such limitations can repeal by implication a law general in its nature? Section 4566 relates to public nuisances in general, and is applicable whenever a nuisance affects three or more persons. The act of 1892 relates to the befouling of waters of any stream used for domestic purposes by the inhabitants of any city, town, or village. While an act which would constitute an offense under the

later law might be a nuisance, still an act which might constitute a nuisance under the former law might not, and doubtless, in most cases, would not, constitute an offense under the later. It is quite clear that the act of 1892 was not intended as a substitute for section 4566, and two statutes are not repugnant to each other unless they relate to the same subject, and are enacted for the same purpose, which is not the case here. This question of a repeal by implication was considered in *Ex parte Gannett*, 11 Utah 283, where the late territorial supreme court entertained similar views. We conclude that the act of 1892 is not in conflict with, and did not repeal section 4566, and that this prosecution was properly instituted under that section.

Counsel for the appellant further insists that the court erred in permitting the witness Clark, after testifying that the water was filthy and impure, because of the sheep being driven across it, and allowed to water at the stream, to state that he knew the water was impure, because his little girl drank some of it, and it made her very sick, causing her to vomit, and be sick at the stomach. This was afterwards, on cross-examination, modified, by the witness stating that he was not sure that the drinking of the water caused the little girl to be sick, but that shortly after drinking it she complained of being sick. We do not think it was proper for the witness to state his opinion, because he was not an expert, but it was competent for him to state the facts connected with the occurrence, and as those facts would in all probability have produced the same effect upon the jury as the objectionable statement, and as the evidence, outside of such statement, was ample to show that the water had been rendered impure by the sheep, and to warrant the jury in returning a verdict against the de-

fendant, we are of the opinion that its admission was not prejudicial error.

It is also contended that the court erred in not permitting the defendant to prove that at the time of the doing of the acts complained of he was on his way to the shearing pens in that vicinity, and on the usual route to the summer range; that the shearing pens were occupied, and that this compelled him to remain there three or four days, and await his turn to shear the sheep. It appears that this evidence was offered to show that on the occasion in question the defendant was in pursuit of a lawful business, and was handling his property with usual and ordinary care, and not in an unreasonable and unwarrantable manner. This, however, was not the point at issue. The only question to be determined was whether or not a nuisance had been committed, and in determining this question the motive or intent with which the defendant did the act complained of could not be considered. If his acts created a nuisance, it is immaterial how innocent the intent was, or how cautiously and reasonably the business was conducted, or whether the business was lawful. These elements do not enter into the question of nuisance, and to allow them to be considered in such a case would be unwarrantably to limit the operation of the maxim, "*Sic utere tuo ut alienum non laedas.*" Therefore any evidence offered for the purpose of showing that these elements existed was inadmissible, and properly ruled out, because immaterial. If the defendant so used his property as to annoy, injure, or endanger the comfort, repose, health, or safety of three or more persons, then his acts were unlawful, and he was guilty of the charge preferred against him, under the statute, even though he was in the pursuit of a lawful business, and conducting it in a reasonable and careful manner. Every person must so use his own property



as not to injure that of his neighbor, and therefore if, as in the case at bar, a person uses his own property in such a way as to cause an injury to another, he is liable. Sir William Blackstone, in his Commentaries on the Laws of England (3 Bl. Comm. c. 13), said: "If one erects a smelting house for lead so near the land of another that the vapour and smoke kill his corn and grass, and damages his cattle therein, this is held to be a nuisance. And by consequence it follows, that if one does any other act, in itself lawful, which, yet being done in that place necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do the act, where it will be less offensive." 16 Am. & Eng. Enc. Law, 930. *Frost v. Phosphate Co.*, 42 S. C. 402; *Moses v. State*, 58 Ind. 185; *Fertilizer Co. v. Malone*, 73 Md. 268; *Seacord v. People*, 121 Ill. 623.

Having determined that the evidence offered was inadmissible, and that its rejection was proper, it becomes unnecessary to discuss the questions raised by the defendant's requests to charge, which were based on the same theory of the law. We are of the opinion that there is no reversible error in the record. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

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14 271  
14 272

ELIZABETH STEPHENS, RESPONDENT, v. THE AMERICAN FIRE INSURANCE COMPANY, APPELLANT.

ACTION ON INSURANCE POLICY—PLEADING—SETTING FORTH INSTRUMENT IN FULL—DEMURRER.

1. Under our system, in a suit upon a written contract, it makes no difference whether a contract is set out in *hæc verba*, or whether it is annexed, and by proper reference made a part of the pleading. However, matters of substance, which are preliminary or collateral to the instrument, must be properly averred so that the ultimate facts for which it was incorporated will be clearly and distinctly presented; and, if the instrument should be defective or ambiguous, it is incumbent upon the pleader to place upon it some construction by proper allegation, or else a demurrer will lie.
2. This action was brought to recover upon a fire insurance policy. The complaint contains an allegation to the effect that between the 15th and 25th of December, 1895, the plaintiff furnished proof of loss. The dates mentioned in this allegation were within the time required by the terms of the policy to furnish such proof, the fire having occurred on the 15th of December, 1895. *Held*, that the allegation was sufficient for the purposes of a general demurrer.

MINER, J., dissenting.

(No. 728. Decided Oct. 20, 1896.)

Appeal from the Second district court, Weber county.  
Hon. H. H. Rolapp, *Judge*.

Action by Elizabeth Stephens against the American Fire Insurance Company to recover loss sustained by fire. From a judgment for plaintiff, defendant appeals.  
*Affirmed*.

*Twomey & Twomey*, for appellant.

*Evans & Rogers* and *A. G. Horn*, for respondent.

BARTCH, J.:

This is a suit on a fire insurance policy to recover for loss occasioned by fire. The defendant interposed a demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and judgment entered in favor of the plaintiff for \$938 and costs. This appeal was prosecuted from the order overruling the demurrer and from the judgment.

The complaint, after alleging the corporate existence of the defendant, avers that the plaintiff, at the time of its insurance and destruction by fire, was the owner of the property in question; that said property was situated on Washington avenue, in Ogden city, Utah Territory; that on the 30th of November, 1895, in consideration of the payment of a premium of \$17,50, the defendant, by its general agent, "made their policy of insurance in writing, which is hereto attached, and made a part of this complaint"; that on December 15, 1895, the insured property was greatly damaged, and in part destroyed, by fire, to the plaintiff's loss thereby in the sum of \$1,200; that between the 15th and 25th of December, 1895, the plaintiff furnished proof of the destruction and loss, and otherwise performed all of the conditions of said policy on her part; and that on February 28, 1896, defendant refused to pay such loss, and denied and disclaimed liability. Counsel for the appellant insist that the complaint, independent of the insurance policy, does not state a cause of action, and that, notwithstanding the express averment to that effect, the policy constitutes no part of

the complaint, and cannot be considered in determining its sufficiency. It is not claimed that the policy is not a properly executed and valid instrument, and the objection therefore goes to the practice of pleading by setting forth such an instrument in full. It amounts to this: because, in effect, there can be no difference in setting out an instrument in *hæc verba* and in annexing it, and by proper reference making it a part of the pleading. Possibly, as a matter of arrangement and convenience, the former mode would be preferable, but in either case the instrument becomes a part of the pleading, and, if one of these methods is objectionable, equally so is the other. Whether, in a suit upon a contract, the making of the instrument a part of the complaint is the best practice, it is not necessary for us to discuss. Such practice appears to be recognized in this state by statute, as will appear from section 3235, Comp. Laws Utah 1888, which reads as follows: "When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified." This section is identical with section 447 of the California Code of Civil Procedure, and was doubtless borrowed from that state, and the supreme court of California has repeatedly recognized the same practice. *Lambert v. Haskell*, 80 Cal. 611; *Ward v. Clay*, 82 Cal. 502; *Whitby v. Rowell*, 82 Cal. 635; *Johnson v. McDuffy*, 83 Cal. 30; *Emeric v. Tams*, 6 Cal. 156; *Hook v. White*, 36 Cal. 299. The same method is also distinctly recognized by Mr. Estee in his work on Pleadings under the Code. 1 Estee, Pl. § 735. See, also, *Budd v. Kramer*, 14 Kan. 85; *State v. School Dist.*, (Kan.) 8 Pac. 208; *Prindle v. Caruthers*, 15 N. Y. 425; *Elbring v. Mullen*, (Idaho) 38 Pac. 404.

Under this practice, however, a party cannot plead

matter of mere evidence. Nor will it relieve him from pleading by proper averment matters of substance which are preliminary or collateral to the instrument, and the instrument on which the action or defense is based must not be defective or ambiguous, but must clearly and distinctly present the ultimate facts for which it is incorporated into the pleading, and on which the pleader relies. If it does not so present such facts, or is defective or ambiguous, it is incumbent upon the pleader to place upon it some construction by proper allegation, or else a demurrer will lie.

It is also insisted by counsel for the appellant that there is no allegation that proof of loss was furnished, or notice given, pursuant to the requirement of the policy. If this contention were admitted to be well taken, it could not avail the appellant, because the complaint contains an averment to the effect that on the 28th day of February, 1896, the defendant company refused to pay the loss and denied and disclaimed any liability; and where an insurance company disclaims liability under the policy, and refuses to pay, proof of loss is not necessary. In such case the loss becomes payable immediately upon such disclaimer and refusal, and proof of loss is waived. *West v. Insurance Soc.*, 10 Utah 442; *Daniher v. Grand Lodge*, 10 Utah 110. Many of the objections made to the complaint in this case cannot be considered on general demurrer. We are of the opinion the demurrer was properly overruled, and that the record contains no reversible error. The judgment is affirmed.

ZANE, C. J., concurs.

MINER, J.:

I cannot concur with my brethren in this case. The statute provides that "the complaint must contain a

statement of facts constituting the cause of action in ordinary and concise language." Under section 3235, Comp. Laws Utah 1888, referred to, the genuineness and due execution of the written instrument only are deemed admitted. It was not intended by the legislature that this section should preclude the necessity of setting out in the complaint a statement of the facts constituting the plaintiff's cause of action in ordinary and concise language. Several matters of substance are lacking in the averments found in the complaint, which are sought to be supplied only by reference to the recitals found in the exhibit annexed to the complaint. As said in *Lambert v. Haskell*, 80 Cal. 613: "Matters of substance, which are preliminary or collateral to the instrument pleaded, cannot be supplied by recitals in the instrument annexed. All that is accomplished by setting forth an instrument in full is to allege its existence and character. It does not involve an assertion of the truth of preliminary or collateral matters recited in the instrument. Whatever may be the effect of such recitals as evidence, they cannot serve as allegations in pleading." In other words, the recitals in the exhibit annexed to the pleadings cannot take the place of, and be substituted for, the allegations required by the statute to be alleged in the complaint. "The use and purpose of an exhibit is to set forth in detail that which is alleged in more general terms, or to embody in the record such facts as will, in legal effect, amount to the facts as alleged in the complaint, or to aid the allegations in fixing more accurately and definitely their import; but not to supply the omission of allegations necessary to present a good cause of action." 4 Enc. Pl. & Prac. p. 610. I am aware of some decisions tending to sustain the view adopted by the court, but I do not think such a practice a proper one

to be followed and adopted in this state to the extent indicated in the opinion of the court. *Los Angeles v. Signoret*, 50 Cal. 299; *Lambert v. Haskell*, 80 Cal. 613; *Johnson v. Insurance Co.*, 3 Wyo. 140; *Insurance Co. v. Kahn*, (Wyo.) 34 Pac. 895; *Larimore v. Wells*, 29 Ohio St. 13; *Bayless v. Price*, (Ind. Sup.) 31 N. E. 88; *Brooks v. Paddock*, 6 Colo. 36; *Morrill v. Trust Co.*, 46 Mo. App. 243; *State v. Samuels*, 28 Mo. App. 649; *Hart v. Tolman*, 1 Gilman 1; *C. Aultman & Co. v. Siglinger*, (N. D.) 50 N. W. 911; *Guadalupe Co. v. Johnston*, (Tex. Civ. App.) 20 S. W. 833; *Railroad Co. v. Parks*, 32 Ark. 131; *Gage v. Lewis*, 68 Ill. 618; *Oh Chow v. Hallett*, Fed. Cas. No. 10,469; *Fitch v. Cornell*, Id. 4,834; 4 Enc. Pl. & Prac. 610; *Miles v. Mays*, (Tex. App.) 16 S. W. 540; *Hill v. Barrett*, 14 B. Mon. 33.

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ON PETITION FOR REHEARING.

(Nov. 11, 1896.)

BARTCH, J.:

In this case the point is now made in the appellant's petition for a rehearing on the question of proof of loss that the appellant company did not disclaim liability under the policy, and refuse payment, until after the time within which proof of loss should have been furnished under the contract. Even if this position be correct, it cannot avail the appellant, because it is alleged in the complaint that between the 15th and 25th of December, 1895, proof of loss was furnished. This was within the time required by the terms of the policy, and we think the allegation, as made in the complaint, was

sufficient for the purposes of a general demurrer. The petition for a rehearing is denied.

ZANE, C. J., concurs.

MINER, J.:

I am of the opinion that a rehearing ought to be granted, based upon the errors assigned in the record.

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ELIZABETH STEPHENS, RESPONDENT, v. THE HOME  
INSURANCE COMPANY OF NEW YORK, AP-  
PELLANT.

(See *Stephens v. American Fire Insurance Company, supra.*)

BARTCH, J.:

This is an action on a fire insurance policy to recover for loss sustained by fire. A general demurrer to the complaint was overruled, and judgment entered in favor of the plaintiff for the sum of \$2,021.55, and for costs of suit. This appeal is from the order overruling the demurrer, and from the judgment. The same legal questions presented for our determination in this case were raised and determined in the case of *Stephens v. Insurance Co.*, 14 Utah 265. The pleadings are also the same in both cases, except that the amount sued for in that is less than in this. We therefore refer to the opinion in that case for our decision of all the questions raised by the record in this, and, on the



authority of that case, we hold that the action of the court in overruling the demurrer and entering judgment herein was proper. The judgment is affirmed.

ZANE, C. J., concurs.

MINER, J.:

I dissent for the reasons given in my dissenting opinion in *Stephens v. Insurance Co.*

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ELIZABETH STEPHENS, RESPONDENT, v. THE CONTINENTAL INSURANCE COMPANY OF NEW YORK, APPELLANT.

(See *Stephens v. American Fire Insurance Company, supra.*)

BARTCH, J.:

This is an action on a fire insurance policy to recover for loss sustained by fire. The defendant demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and judgment entered in favor of the plaintiff for the sum of \$503.85 and costs of suit. This appeal is from the order overruling the demurrer, and from the judgment. The legal questions which we are asked to determine in this case are precisely the same as those raised and determined in the case of *Stephens v. Insurance Co.*, 14 Utah 265. The pleadings in both cases are also the same, except that

the amount sued for is less in this case than in that. We therefore refer to the opinion in that case for our decision of all the questions raised by the record in this case, and, on the authority of that case, we hold that the action of the court in overruling the demurrer and entering judgment herein was proper. The judgment is affirmed.

ZANE, C. J., concurs.

MINER, J.:

I dissent for the reasons given in my dissenting opinion in *Stephens v. Insurance Co.*

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LYDIA Y. MERRILL, APPELLANT, v. JOHN D. SPENCER, RESPONDENT.

14	273
16	334
14	273
24	281

COUNTY SCHOOL TAX—VALIDITY AS TO CITIES OF FIRST AND SECOND CLASS—CONSTITUTIONAL LAW.

1. The proper construction of section 6, art. 10, of the constitution of the state of Utah, which provides that "in cities of the first and second class, the public school system shall be maintained and controlled by the board of education of such cities separate and apart from the counties in which said cities are located," is that in cities of the first and second class the public school system shall be maintained by the board of education of such cities. The board of education of such cities shall bear the expenses of, keep up, supply what is needed, maintain, and control the public school system therein; and such system of public schools shall be so maintained and controlled separate

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and apart from the counties in which said cities are located. The intention of the framers of this section was to locate and fix geographical divisions in counties containing cities of the first and second class, and make it the duty of the board of education of such cities to support, bear the necessary expense of, maintain, and control the public school system therein, separate and apart from the control of the counties in which such cities are located. The maintenance and control of public schools in said cities are made independent, separate, and apart from the counties in which they are located, and are to be controlled by the board of education of such cities separate and apart from the control of the county commissioners.

2. The collection of the county school tax within Salt Lake City, and the subtraction of about \$30,000 from such fund so raised for various county school purposes, before the fund is distributed according to the number of children of school age, under the several acts of the state legislature, is an evasion and violation of section 6, art. 10, of the state constitution; and certain provisions added to section 88, art. 10, p. 489, Sess. Laws 1896, and section 115, art. 15, p. 497, Sess. Laws 1896, and other like provisions, are *held* invalid and repugnant to section 6, art. 10, of the constitution.

(No. 758. Decided Dec. 12, 1896.)

Appeal from the Third district court, Salt Lake county.  
Hon. M. L. Ritchie, *Judge*.

Action by Lydia Y. Merrill against John D. Spencer, county collector, to restrain the collection of a tax levied under the provisions of section 91 of the revenue act, Laws of 1896, p. 451. This section provides that the board of county commissioners each year "must levy taxes upon the taxable property of the county, not exceeding five mills on the dollar for county purposes, nor three mills on the dollar for district school purposes." From an order sustaining a demurrer to the complaint, and a judgment of dismissal, plaintiff appeals. *Reversed*.

*Williams, Van Cott & Sutherland, and Bennett, Harkness, Howat & Bradley, for appellant.*

*C. O. Whittemore, for respondent.*

The plaintiff, in her complaint, alleges, in substance, that she is a resident of Salt Lake City, in Salt Lake county, and the owner of property in Salt Lake City; that a tax for county school purposes of two mills on the dollar has been levied in Salt Lake county in 1896; that said county school tax is levied for the support of the district schools within and without Salt Lake City, but all within Salt Lake county; that the total sum of said tax, if collected, would amount to \$87,012.98, and the amount thereof that would be collected from Salt Lake City alone would amount to \$71,956.26, and that of such school tax Salt Lake City would pay in excess of the amount distributed to it according to the number of school children the sum of \$30,580; that there is a board of education duly organized and in control of the public school system within Salt Lake City, and such board has been, and now is, maintaining and controlling the public school system in Salt Lake City, and has levied a city tax for the year 1896 on all taxable property, for the support and maintenance of such city public schools; that such board pays its city superintendent of schools, members of its board of examiners, its treasurer, and all other incidental, proper, and necessary expenses from its own funds; that plaintiff is assessed for said county school purposes for the year 1896, on her land specified, the sum of \$106.38, and has paid all the taxes assessed against her except the said sum assessed as county school taxes; that during the years 1893 to 1896, both years inclusive, and prior thereto, Salt Lake City paid into the territorial school fund a large amount annually in excess

of what it received from such school fund, when the same was distributed according to the number of school children; that Salt Lake City is a city of the first class; that said defendant will sell the property of plaintiff to collect said county school tax, unless restrained, and plaintiff's title thereto become thereby clouded,—and prays for an injunction, etc. To this complaint defendant filed a demurrer, alleging that the same does not state facts sufficient to constitute a cause of action, nor to entitle the plaintiff to the relief sought. The demurrer was sustained. Plaintiff elected to stand upon her complaint. Thereupon the court dismissed said plaintiff's complaint, with costs. From this judgment and order the plaintiff appeals, and alleges that the court erred in sustaining the demurrer, dismissing the complaint, and refusing to grant the injunction prayed for, and that there is no law authorizing the collection of any county school tax on property within Salt Lake City.

MINER, J., after stating the case, delivered the opinion of the court.

The only question presented by this appeal is whether there is any law in this State authorizing the levy and collection of any county school tax on property within said Salt Lake City. It is conceded that for many years before Utah became a state a school tax was levied within the territory, which constituted the territorial school fund. It was collected according to the value of the property, and distributed according to the number of school children of school age. According to the working of the system, Salt Lake City paid annually into the school fund a large sum in excess of what it received back. A county school tax was likewise levied in the county which includes Salt Lake City, in the same manner, and the fund was distributed the same. What was

true of Salt Lake City with reference to the territory, was also true with reference to the county. In this way Salt Lake City paid annually large amounts into both funds in excess of what it received back. Counties having no cities of the first and second class were not subject to this system of excessive or double taxation. Section 6 of article 10 of the constitution of Utah provides that "in cities of the first and second class, the public school system shall be maintained and controlled by the board of education of such cities, separate and apart from the counties in which said cities are located." The principal question in this case is as to the meaning of the word "maintained," as used in this section. Section 2996, Comp. Laws Utah 1888, provides that "words and phrases are construed according to the context, and the approved usage of the language. \* \* \* " Webster, in subdivision 4, defines the word "maintain" to mean "to bear the expense of; to support; to keep up; to supply with what is needed." Section 26 of article 1 of the constitution says, "The provisions of this constitution are mandatory, and prohibitory, unless by express words they are declared to be otherwise." It is a familiar rule of construction that a word repeatedly used in a statute will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended. Article 10 of the constitution relates to education, and provides with reference to the different educational institutions of the State. In section 1 of article 10 of the constitution the legislature is required to provide for the establishment and maintenance of a uniform system of public schools. In section 2 of article 10 it is provided that high schools shall be maintained free in all cities of the first and second class. In the latter part of the same section the word "maintain" is used in connection with moneys appor-

tioned to support schools. In section 10 the word "maintenance" is used in connection with a fund to support the deaf and dumb asylum. The same word is used many times in this article as bearing upon and having reference to the support and maintenance of schools. In *Judson v. Blanchard*, 4 Conn. 566, the word "maintain" is held to mean "to bear the expense of." In *Rhodes v. Mummery*, 48 Ind. 217, the word "maintain" is defined as meaning "to bear the expense of." In *City of New Haven v. Whitney*, 36 Conn. 375, it is held that "a statute that prescribes that a thing shall be done in a particular way carries with it an implied prohibition against doing it any other way." "So when a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others."

Words in a constitution are not to be stretched beyond their fair sense, but within that range the rule of interpretation must be taken which will best follow out the apparent intention of its framers. "Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purposes of that provision, as strong as if a negative was expressed in every sentence." "In a statute that which is implied is as much a part of it as that which is expressed." *North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 14 Utah 155; *Suth. St. Const.* §§ 325-327; *Cooley, Const. Lim.* 78-105. Section 6 of article 10 has a plain meaning. It will be noticed that this section does not provide that the public school system within Salt Lake City shall be maintained separate and apart from the state, but simply separate and apart from the county. The plain meaning of the section is that in cities of the first and second class the public school system shall be maintained and controlled by the board of education of such cities. The board of education of such cities shall

bear the expenses of, keep up, supply what is needed, maintain, and control the public school system therein. And such system of public schools shall be so maintained and controlled separate and apart from the counties in which said cities are located. The intention of the framers of this section was to locate and fix geographical divisions in counties containing cities of the first and second class, and make it the duty of the board of education of such cities to support, bear the necessary expense of, maintain, and control the public school system therein separate and apart from the control of the counties in which such cities are located, and separate and apart from the control and supervision of the board of county commissioners of the respective counties where such cities of the first and second class are located. So far as the maintenance and control of the public schools in cities of the first and second class are concerned, they are made independent, separate, and apart from the counties in which such cities are located, and are to be controlled by the board of education of such cities, separate and apart from the control of the county commissioners. No other reasonable construction can be placed upon the language used in this section.

In framing section 6 of article 10 the constitutional convention must have found that in the previous workings of the several provisions of the statute there was a mischief existing which should be suppressed. The convention sought to suppress the mischief by framing this provision of the constitution providing that the school system shall be maintained and conducted in cities of the first and second class by the board of education of such cities, separate and apart from the counties in which the said cities are located. Section 94, p. 490, Sess. Laws 1896, provides, in substance, that the county com-



missioners of each county shall levy a tax not to exceed two mills on the dollar for county school purposes. Section 88, art. 10, p. 489, Sess. Laws 1896, provides as follows: The county superintendent of each county shall, immediately upon receiving the appointment from the state superintendent, proceed to apportion the state and county school funds to the several school districts of his county, according to the number of school children residing in each district, over six and under eighteen years of age, as appears from the last enumeration reported to his office; provided, that before making such apportionments he shall set aside so much of said fund as the board of county commissioners shall order for the payment of the compensation of the county superintendent, members of the board of examiners, the treasurer, the expenses of the county institute, and contingent expenses of the county superintendent's office." Section 115, art. 15, p. 497, Sess. Laws 1896, provides as follows: "All cities of the first and second class shall be governed by the provisions of this article. In cities of the first and second class, the public school system shall be maintained and controlled by the board of education of such cities, separate and apart from the counties in which said cities are located; provided, that this section shall not be construed as relating to the levying, collecting or apportioning of state or county school taxes." These statutes were passed just after the adoption of the constitution, and it is apparent that the legislature, while enacting section 6 of article 10 of the constitution into section 115, above quoted, at the same time added thereto a proviso, which, if effective, would avoid the plain meaning of the constitution, and give it an interpretation which its framers did not intend it to bear. At the same session section 88 was passed, with the proviso above quoted, by which it is

made the duty of the county superintendent, before making the apportionment to the several school districts of the county, to set aside from said school fund so much thereof as the board of county commissioners shall order for payment of the expenses of the county superintendent, members of the board of examiners, treasurer, expenses of the county institute, and contingent expenses of the county superintendent's office. All these expenses are defrayed by Salt Lake City out of its own fund, and yet, before it receives back its proportion of the school fund according to the number of children, the fund is depleted for the county expenses enumerated, and by this means Salt Lake City is required to pay about \$30,000 annually into the school fund more than it receives back. The collection of the county school tax within Salt Lake City, and the subtraction from such fund so raised for various county school purposes before it is distributed according to the number of children of school age under the statutes referred to, is an evasion and violation of section 6 of article 10 of the constitution of the state; and the said provisos added to said sections 88 and 115, and other like provisions, are invalid, and repugnant to the constitution. The order and judgment of the court below is reversed, with instructions to grant an injunction perpetually restraining and prohibiting the defendant from collecting the county school tax referred to in the complaint within Salt Lake City.

ZANE, C. J., and BARTCH, J., concur.

**JOHN BUTTE, APPELLANT, v. PLEASANT VALLEY  
COAL COMPANY, RESPONDENT.**

**INJURY TO MINER—CONTRIBUTORY NEGLIGENCE.**

1. A miner cannot recover damages from his employer for an injury in consequence of a defective car track, which it was his duty to repair, in a room in which he was working.
2. Nor can he recover damages for an injury in consequence of a defect in a track in his room, which it was his duty to report to the manager of the mine, or other person over him, when he did not report.

(No. 721. Decided Dec. 10, 1896.)

Appeal from the Third judicial district court, Territory of Utah. Hon. S. A. Merritt, *Judge*.

Action of tort brought by John Butte against the Pleasant Valley Coal Company for an injury received by plaintiff while working in defendant's mine. From an order directing a non-suit, plaintiff appeals. *Affirmed*.

*Powers, Sraup & Lippman*, for appellant.

Cited: As questions of fact for the jury to determine: *Wines v. Ry. Co.*, 9 Utah 129; *Olson v. Ry. Co.*, 9 Utah 129; *Smith v. Ry. Co.*, 9 Utah 141; *Jeff's v. Ry. Co.*, 9 Utah 374; *Grand Trunk v. Ives*, 144 U. S. 408; *Linderberg v. Crescent Min. Co.*, 9 Utah 163; *Franklin v. Ry. Co.*, 85 Cal. 63; *House v. Meyer*, 100 Cal. 592; *Benson v. Ry. Co.*, 98 Cal. 45; *Sher. & Red. Neg. sec. 114*; *Bowers v. Ry. Co.*, 4 Utah 215, 253; *Reddon v. Ry. Co.*, 15 Pac. (Utah) 262; *Fernandez v. Ry. Co.*, 52 Cal. 45; *Ingerman v. Moore*, 90 Cal. 410; *Gisson*

v. *Schwabecker*, 99 Cal. 419; *Magee v. N. P. C. R. R. Co.*, 78 Cal. 430; *Sher. & Red. Neg. sec. 211*; *Hawley v. N. C. R. R. Co.*, 82 N. Y. 370; *De Wire v. Bailey*, 131 Mass. 169; *Beach. Neg. p. 39*; 4 Am. & Eng. Ency. Law, 34-5; *Pidock v. R. R.*, 19 Pac. (Utah) 191; *Stephens v. Hannibal R. R. Co.*, 96 Mo. 20 (9 Am. St. Rep. 412).

*Bennett, Harkness, Howat & Bradley*, for respondent.

"If one chooses in such a position to take the risks, he must bear the possible consequences of failure." *Railway Co. v. Houston*, 95 U. S. 697.

When the facts are undisputed the effect of the testimony is a question of law, unless reasonable men might fairly draw different conclusions from the testimony. *Railroad Co. v. Ives*, 144 U. S. 408; *Olson v. R. R. Co.*, 9 Utah 129; *Bunnell v. Ry. Co.*, 13 Utah 314.

When the evidence is undisputed or is of such conclusive character that the court in the exercise of a sound judicial discretion would be compelled to set aside a verdict returned in opposition to it, the court should withdraw the case from the jury. *Ry. Co. v. Houston*, 95 U. S. 697; *Anderson County v. Beal*, 113 U. S. 227-241; *Scofield v. Ry. Co.*, 114 U. S. 615; *R. R. Co. v. Converse*, 139 U. S. 469-472; *Elliott v. Ry. Co.*, 150 U. S. 245; *Ry. Co. v. McDonald*, 152 U. S. 262-282; *Victor Coal Co. v. Muir*, 20 Col. 320-331; *Bunnell v. Ry. Co.*, 13 Utah 314.

ZANE, C. J.:

This action was instituted by the plaintiff to recover compensation for an injury caused, as alleged, by the negligence of the defendant in constructing and maintaining a defective and dangerous track, to be used in the prosecution of his work while in the employ of the

defendant as a miner. It is alleged that the rails rested on defective ties, and that they were not fastened with a sufficient number of spikes, because of which a car operated by plaintiff fell from the rails and struck the plaintiff's back, causing the injury complained of. On the trial of the cause the plaintiff testified that, in the prosecution of his work, he would move the car up near the face of the room, and, when loaded, the driver, by means of a mule, would move the cars upon a track out of the mine; that, on the occasion of the injury, he loaded his car, standing near a post, which he wished to make more secure, and with the assistance of a miner from another room he attempted to push it about two feet out of his way, when a wheel dropped between the rails; that he did not look at the time to ascertain the cause, nor did he examine the track before the injury; that they were at the end of the car, lifting, when his assistant turned around to see if the wheel was on the rail, and the car turned over, and struck him on the back. The plaintiff testified, further, that it was the duty of the miners to lay the track in the room, and keep it in repair, when the company furnished material to repair it with; that plaintiff had been mining in the room two days and a half; that the track had been laid by another miner, who had been at work in the room before plaintiff commenced. In that case he stated it was his duty to report defects to the foreman, but he made no such report. There was other testimony to the effect that there were no spikes to repair with at the time, except as they were taken from ties not in use. Such is the evidence given by the plaintiff, and it stands in the record uncontradicted. Undoubtedly, the track was insecure at the place of the injury; but it was plaintiff's duty to repair it, or, as he says, to give notice to the foreman or manager of the want of repair. As to the existence of these facts,

there is no room for doubt. When the plaintiff rested, defendant's counsel moved for a non-suit, which the court granted after argument by counsel of the respective parties. To this judgment plaintiff excepted, and prosecuted this appeal, and assigns the judgment as error.

While the defendant may have been guilty of negligence that contributed to the injury complained of, it is clear that the plaintiff's negligence also contributed to the same injury. As to plaintiff's want of reasonable care, the evidence leaves no room for doubt or a difference among fair-minded men. The jury should be permitted to find as to the existence of any essential fact as to which there may be a substantial conflict in the evidence; but when there is no evidence of the existence of a fact essential to a recovery, or when the evidence establishes a fact fatal to a recovery, with such certainty as to leave no reasonable doubt in the minds of fair men, the court should grant a motion for a non-suit, or, if the case is submitted to the jury, instruct a verdict for the defendant. *Railway Co. v. Ives*, 144 U. S. 408; *Schofield v. Railway Co.*, 114 U. S. 615.

We find no error in this record. The judgment is affirmed.

BARTCH and MINER, JJ., concur.

GEORGE F. CULMER, RESPONDENT, *v.* FRANCIS D.  
CLIFT ET AL., APPELLANTS.

MECHANIC'S LIENS—TIME FOR FILING—DESCRIPTION—ASSIGNMENT—  
ACTION TO ENFORCE—VARIANCE—DAMAGES—OBJECTIONS  
TO EVIDENCE.

1. Defendant Clift entered into a contract with Nink and others for the construction of a certain building. Plaintiff and others furnished materials for said building, and assignments of the claims arising under the mechanic's liens were made by the others to plaintiff, who brought this suit to foreclose them. Clift filed an answer, in which he set up payment of \$19,082, to the contractor Nink, the full contract price except \$2,727, which he held for the benefit of the contractor, sub-contractors and material men, as they might prove their right thereto. This answer was filed September, 1891; and on May 19, 1894, defendant Clift filed an amended supplemental answer, claiming that the contract had not been completed as agreed, and claimed damages in the sum of \$5,370, but did not waive or change any part of the original answer. Judgment and sale of the property were ordered to satisfy the several mechanic's liens, which were assigned to plaintiff, aggregating \$2,108.25.
2. Where the allegations of the complaint state that Culmer Bros., at the request of Clift and his architects C. & K., furnished materials, and the lien filed in proof states that the material furnished was in pursuance of a contract made by Culmer Bros. with B., C. & K., and N., who were the principal contractors employed by Clift, the variance is not such as to mislead the appellant, and therefore within sections 3252, 3253, Comp. Laws 1888, and section 14, p. 27, Sess. Laws 1890.
3. It was competent for the different parties having claims for material to assign (under section 28, c. 80, p. 31, Sess. Laws 1890) their claims to plaintiff, for the purposes of this suit.
4. The court properly deducted the amount (\$1,100) found due the defendant Clift as damages, and also properly added interest

14	286
16	372
14	286
21	76
14	286
24	373
24	487

from the time of the date of the several liens; that being the time when the several sums should have been paid.

5. It is a uniform rule that general exceptions to the admission of evidence are unavailable to parties making them, either on motion for new trial or appeal. The particular grounds of the objections must be stated, so that the trial court may understand the nature of the objection before passing upon it.
6. It was not necessary to file liens before the completion of the contract, and the law was complied with if filed within 40 days after the materials were furnished and labor performed. *Morrison v. Cary-Lombard Co.*, 9 Utah 70; *Lumber Co. v. Partridge*, 10 Utah 322, construing the lien law of 1890.
7. The fact that the liens do not cover all the premises owned by Clift, upon which the buildings were erected, does not affect the validity of the liens filed.

(No. 625. Decided Nov. 9, 1896.)

Appeal from the Third district court, Territory of Utah.  
Hon. S. A. Merritt, *Judge*.

Action by George F. Culmer against Francis D. Clift and others to foreclose four mechanics' liens, on three of which judgment of foreclosure was rendered, viz.: one in favor of G. F. Culmer & Brothers, one in favor of E. C. Coffin Hardware Co., and one in favor of Fred W. Gray.

*Brown, Henderson & King*, for appellants.

*Sutherland & Murphy* and *Andrew Howat*, for respondent.

No briefs were filed.

MINER, J.:

In 1890, defendant Clift entered into a contract with defendant Nink to furnish material and labor to rebuild the Gladstone building, in Salt Lake City, under plans



prepared by Carrol & Kern, his architects, and under their supervision. As the work progressed, changes were made in the plans, and additional contracts entered into. G. F. Culmer & Bros., the E. C. Coffin Hardware Company, Fred W. Gray, as material men and sub-contractors, assigned their claims arising from mechanics' liens to the plaintiff, who brought suit to foreclose the same. F. D. Clift, the owner of the building, A. Nink, the principal contractor, Carrol & Kern, and A. Braun, sub-contractors, being all the parties in interest, were made defendants, and all made default except Clift, the appellant, who answered. All the parties were before the court as witnesses. The defendant Clift took possession of the building after its completion, in December, 1890. This suit was commenced to foreclose the liens, May 5, 1891. In September, 1891, Clift filed an answer, alleging that, before notice of any lien or claim, he had paid the contractor Nink \$19,082.27, the full contract price, except \$2,727, which sum he then held for the benefit of the contractors, sub-contractors, and material men, as they may prove their right thereto, which sum he was ready to pay over, as may be adjudged by the court. On May 19, 1894, defendant Clift filed his amended supplemental answer, claiming that the contract had not been completed as agreed, and that he had lost rents, and was damaged thereby in the sum of \$5,370, which he desired to be offset as against the claims set up in the complaint, but did not waive or change any part of the original answer. The principal question in which the appellant was interested on the hearing in the court below was as to the amount of damages he was entitled to withhold as against Nink, the principal contractor. No personal decree was rendered against the defendant Clift, but findings were made, and judgment and sale of the property

were ordered to satisfy these several mechanics' liens, which were assigned to the plaintiff, aggregating \$2,108.25, including interest. From this judgment, defendant Clift appealed to this court, in July, 1895.

The appellant's first contention is that there is a variance between the complaint and the proof as to the claim of Culmer Bros. The allegation in the complaint is that Culmer Bros., at the request of Clift and his architects, Carrol & Kern, furnished material, etc. The lien filed and in proof states that the material furnished and labor performed were in pursuance of a contract made by Culmer Bros. with Braun, Carrol & Kern, and A. Nink, who were the principal contractors employed by defendant Clift to construct the building. Certain proof was offered which tended to connect the defendant with the several contracts upon which liens were filed.

Section 3252, Comp. Laws Utah 1888, provides that "no variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Section 3253, Id., provides that, "where the variance is not material as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs." Section 14, p. 27, Laws 1890, provides that "any informality in any such statement that shall not tend to mislead, shall not affect the validity thereof. No incorrect estimate in any such statement of the amount due or to become due, or of any probable value, shall affect the validity of any such statement, unless such incorrect estimate be made in bad faith. \* \* \*

The court found the facts according to the evidence,

and it does not appear that the defendant was misled by the variance to his prejudice. He admitted in his answer that the sum of \$2,727 was still in his hands, belonging to the contractors, sub-contractors, and material men, which he was willing to pay as directed by the court. There was a variance, however, between the allegations in the complaint and the proof, but not in its general scope and meaning, as shown by the pleading and proofs. Under the circumstances shown in this case, we do not consider the variance pointed out by the appellant between the allegations and proof so material and important that it misled the defendant to his prejudice in maintaining his defense upon the merits. *Holman v. Pleasant Grove City*, 8 Utah 78.

It is also contended that the several assignments of mechanics' liens were made to the plaintiff for the purpose of bringing suit, and that such assignments were improperly admitted in evidence. Section 28, c. 30, p. 31, Sess. Laws 1890, expressly authorizes such assignments, and provides that the purpose of enforcement of any mechanics' liens by action under this act shall be a sufficient consideration as to all other parties for the purpose of such action. Such assignments have been held good, under section 3169, Comp. Laws 1888. *Wines v. Railway Co.*, 9 Utah 228; Pom. Rem. & Rem. Rights (2d Ed.) § 132; *O'Connor v. Irvine*, 74 Cal. 435.

The court found, upon conflicting evidence, that the damages set up by Clift in his amended answer did not amount to exceed the sum of \$1,100, and allowed that sum as damages to Mr. Clift, and fixed the amount of the several liens at \$1,653.45, with interest thereon from the date of the several liens. The testimony upon this subject was conflicting. The sum found as damages is supported

by the testimony, and we see no good reason for disturbing the findings. The judgment simply covered the amount of the liens, and falls within the sum still remaining in the hands of the defendant Clift, after deducting the \$1,100 damages allowed him. The interest was properly added from the time of the date of the several liens, that being the time when the several sums should have been paid.

We think the description of the property set up in Culmer Bros.' and Gray's intention to hold a lien, taken in connection with the testimony upon that subject, is sufficient, and could not have misled or prejudiced the defendant.

The verification of Mr. Gray's lien by P. L. Williams, in behalf of and as attorney for Mr. Gray, was sufficient. Section 10, p. 26, Sess. Laws 1890, provides that the abstract of indebtedness shall be verified by the claimant, or by some other person in his behalf.

The record shows that P. L. Williams was called, and testified that he received a letter or telegram from Mr. Gray, authorizing him to assign the Gray lien to plaintiff, and he assigned the same accordingly; such instructions were received in answer to a letter written by witness to Gray, in which witness was authorized to make the assignment suggested in his letter; that he had searched for the instructions in his office, where such matters were kept, but the same could not be found. Thereupon the following question was asked witness, and objection made thereto: "Q. To whom was the assignment to be made, as suggested in your letter? (Question objected to. Objection overruled, and exception taken.) A. To G. F. Culmer." This ruling of the court is assigned as error. The objection did not point out the ground upon which

it was made, and therefore does not merit consideration. The point of the objection should have been particularly stated, in order to entitle it to consideration. This is the uniform rule. General objections to the admission of evidence are unavailable to the party making them, either on motion for new trial or appeal. The particular grounds of the objection must be stated, so that the trial court may understand the nature of the objection before passing upon it. *Kiler v. Kimball*, 10 Cal. 268; *Frier v. Jackson*, 8 Johns. 496; *Camden v. Doremus*, 3 How. 515; 1 Greenl. Ev. § 421; *State v. Moore*, (Mo. Sup.) 22 S. W. 1086; *Railway Co. v. Henson*, 7 C. C. A. 349; *Crocker v. Carpenter*, (Cal.) 33 Pac. 271; *U. S. v. McMasters*, 4 Wall. 680; *Curry v. Bratney*, 29 Ind. 195.

The appellant contends that none of the liens were filed until after the completion of the contract, and therefore they did not attach. This contention is answered by sections 10, 11, c. 30, Sess. Laws 1890, and by the construction of the lien law by this court in the cases of *Morrison v. Carey-Lombard Co.*, 9 Utah 70; and *Lumber Co. v. Partridge*, 10 Utah 322, to which reference may be had. The liens were filed within 40 days after the materials were furnished and labor performed.

The fact that the liens do not cover all the premises owned by Mr. Clift, upon which the building was erected, does not affect the validity of the liens filed. Mr. Clift cannot be injured by a lien that does not cover as much of his property as it might have covered. The land and building described in the decree upon which the lien is created is the same land upon which materials were furnished and labor performed by the several lienholders.

Other matters are discussed by counsel, but we do not consider them of sufficient importance for further consid-

eration. We find no reversible error in the record. The judgment and decree of the court below are affirmed, with costs.

ZANE, C. J., and BARTCH, J., concur.

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STATE v. BATES.

CONSTITUTIONAL LAW—MURDER—TRIAL BY EIGHT JURORS—PRIVILEGES AND IMMUNITIES—EX POST FACTO LAWS.

14	293
15	483
a15	489
14	293
119	441
14	293
22	68

1. The description of the offense in the indictment included murder in the first degree, as well as in the second; but the crime was characterized as murder in the second degree, and the record showed that the defendant was actually tried for and convicted of that offense. *Held*, a trial by eight jurors did not violate section 10 of article 1 of the State Constitution, nor did such trial by eight jurors violate section 7 of the same article, which declares that "no person shall be deprived of life, liberty or property without due process of law."
2. Section 10 of article 1 of the constitution of Utah, which declares that "in courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors," is not in conflict with article 6 of the amended constitution of the United States, wherein it says that "in all criminal prosecutions the accused shall enjoy the right to \* \* \* a trial by an impartial jury of the state and district wherein the crime shall have been committed." The last article does not apply to trials under state laws.
3. Nor is section 10 of the state constitution repugnant to the first section of the fourteenth amendment of the federal constitution. The first clause of that section makes all persons born

or naturalized in the United States, and subject to its jurisdiction, citizens of the United States, and of the state wherein they reside; and the second clause, which declares that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, has no application to jury trials under state laws in state courts. It does not refer to the privileges or immunities of the individual as a citizen of the state; it refers to the privileges and immunities of the individual as a citizen of the United States.

4. Nor does section 10 of the state constitution conflict with the third provision of section 1 of article 14 of the federal constitution, which declares that no state shall "deprive any person of life, liberty or property, without due process of law." That provision left the power with the people of the state, by a constitutional provision, to reduce the number of jurors for the trial of a cause in the state courts from 12 to 8.
5. The defendant was tried by 8 jurors on April 7, 1896, upon an indictment charging him with murder in the second degree, and convicted. The offense was committed on the 22d day of September, 1895, and the provision of the state constitution reducing the number of jurors from 12 to 8 took effect on January 4, 1896. *Held*, that the change did not deprive the defendant of a substantial right, and that the constitutional provision making the change was not *ex post facto* and void.

(No. 712. Decided Dec. 10, 1896.)

Appeal from the Third District Court, Tooele county.  
Hon. John A. Street, *Judge*.

George Bates was convicted of murder in the second degree and sentenced to ten years' imprisonment, and appeals. *Affirmed*.

*Powers, Straup & Lippman*, for appellant.

The court had no jurisdiction to try the defendant with less than twelve men as a jury.

Section 10, of article 1, of our constitution is repugnant to the 14th amendment to the United States constitution.

It abridges the privileges of citizens and deprives citizens charged with crime of due process of law. Thompson on Juries 810, and cases cited; *Hill v. People*, 16 Mich. 355; *Cancemi v. People*, 18 N. Y. 128; *Work v. State*, 2 Ohio St. 296; *Flint River Steamboat Co. v. Roberts*, 48 Am. Dec. 186, note; *Hurtado v. People*, 110 U. S. 516; Opinion of the Justices, 41 N. H. 550.

Section 10 of article 1, of the constitution of Utah, in so far as it provides for the trial of criminal cases by eight men, is repugnant to and in conflict with section 12, of article 1, of the constitution of Utah, and is therefore void.

Section 12 guarantees to the accused the right "to have a speedy public trial by an impartial jury." This is without limitation or qualification. It means a jury of twelve men. *State of Nevada v. McClear*, 11 Nev. 40; *Carpenter v. State*, 34 Am. Dec. 116; *Wynehamer v. People*, 13 N. Y. 378, 446; *Oruger v. Hudson R. Railroad*, 2 Kern. 190; *People v. O'Niel*, 48 Cal. 257; *People v. Powell*, 87 Cal. 348.

When one section of a public act limits or abrogates a right existing prior to its enactment, and another section of the same act preserves that right, the courts, in giving force to the act, will disregard the section of limitation or abrogation and enforce the right.

Section 10 of the constitution must receive a strict construction for it deprives citizens of pre-existing rights. *Sherwood v. Reade*, 7 Hill 431; *Striker v. Kelley*, 2 Denio 323; *Sheup v. Spier*, 4 Hill 76.

Section 10 is clearly contradictory of section 12. There are several direct adjudications that the provision which is latest in position repeals the other. *Packer v. Sunbury R. R. Co.*, 19 Pa. St. 211; *Ryan v. State*, 5 Neb. 276, 282; *Gibbons v. Brittenum*, 56 Miss. 232; *Harrington v. Rochester*, 10 Wend. 547, 553; *Brown v. County Comr's*, 21 Pa. St. 37,



42; *Quick v. Whitewater*, 7 Ind. 570; *Albertson v. State*, 9 Neb. 429; *Sams v. King*, 18 Fla. 557; *Branagan v. Dulaney*, 8 Col. 408; *Gee v. Thompson*, 11 La. Ann. 657; *Farmers' Bank v. Hale*, 59 N. Y. 53.

"Law of the land" means "due process of law," according to the principles of the common law, rather than to the provisions of the statute law. That is to say, liberty, property and health shall be placed under the general laws governing society. *Sedgwick Const. Law*, p. 475; *Embury v. Cowner*, 3 N. Y. 511; *Taylor v. Porter*, 4 Hill 140; *Randall v. Brigham*, 7 Wall. 523; *Parsons v. Russell*, 11 Mich. 129; *Westervelt v. Gregg*, 12 N. Y. 212; *Wynehamer v. People*, 13 N. Y. 378; *Wall v. Kennedy*, 2 Yerger (Tenn.) 554; *Pennoyer v. Neff*, 95 U. S. 714; *Murray v. Hoboken Land Co.*, 18 How. 217.

Section 10 of the constitution operates in this case as an *ex post facto* law. *Kring v. Missouri*, 107 U. S. 221; *Cooley on Con. Lim.* 330; *Kennett's Petition*, 24 N. H. 139; *Willard v. Harvey*, 24 N. H. 344.

*A. C. Bishop*, Attorney General.

*C. S. Varian* and *Benner X. Smith*, for respondent.

ZANE, C. J.:

The defendant was tried upon an indictment charging him with the murder of the late John Nordquist, by feloniously, and with malice aforethought, striking him upon the head with a wooden pole. In the indictment the grand jury expressly characterized the crime as murder in the second degree. Upon the trial, the petit jury found the defendant guilty of murder in the second degree. The court overruled a motion for a new trial, and sentenced him to confinement in the state prison for the term of 10 years. From the order overruling the motion

for a new trial, and from the sentence, the case is before this court on appeal.

The trial was by a jury of 8 men, to which the defendant objected at the time, and demanded 12, and excepted to the denial of his objection and demand, and now assigns it as error. Section 10 of article 1 of the constitution of the state of Utah declares that "in capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded." The punishment of murder in the second degree is imprisonment at hard labor in the penitentiary, "for not less than ten years, and which imprisonment may be extended to life." Laws 1890, p. 94. While the description of the offense included murder in the first degree, as well as murder in the second degree, the grand jury characterized the crime as murder in the second degree, and thereby expressed an intent to accuse the defendant of that offense, and not with a capital crime. The defendant was tried for murder in the second degree, as the rulings of the court and its charge to the jury show, and he was convicted of and sentenced for that crime. Therefore the crime was within the second clause of the above section.

But the defendant insists that section 7 of the same article, which says that "no person shall be deprived of life, liberty or property, without due process of law," secured him the right to be tried by 12 persons. To hold that the authors of the state constitution intended by the use of the phrase "due process of law" to require a jury

of 12 jurors in all cases would be to say, in effect, that they intended to create a repugnancy in that instrument. The rules of construction of constitutional law, as well as statute law, require that both sections shall be allowed to stand, and effect be given to each. We are of the opinion that they can stand together, and that no conflict was intended.

The defendant also claims that section 10, *supra*, conflicts with the constitution of the United States, and that it is void for that reason. Article 6 of the amendment to that instrument declares that "in all criminal prosecution the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. \* \* \*" This amendment applies to the United States government, not to the states. Limitations imposed on the powers of government by the constitution of the United States are upon that government alone, unless the states are mentioned. "The states may, if they choose, provide for the trial of all offenses against the states, as well as for the trial of civil cases in the state courts, without the intervention of a jury, or by some different jury from that known to the common law." Cooley, Const. Lim. (6th Ed.) pp. 29, 30; *Twitchell v. Com.*, 7 Wall. 321; *Edwards v. Elliott*, 21 Wall. 532.

Defendant's counsel also insists that section 10, *supra*, conflicts with section 1 of the fourteenth amendment to the constitution of the United States, as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, lib-

erty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The first clause of the section makes all persons born or naturalized in the United States, and subject to the jurisdiction thereof, citizens of the United States, and of the state wherein they reside. Citizenship of the United States is distinguished from citizenship of the state. All persons of the description mentioned are clothed with two distinct citizenships,—they are citizens of the United States, and of the state wherein they reside. As to the second clause of the section, it may be said that the privileges and immunities of an individual as a citizen of the United States go with him and protect him in any state, and, under treaties and the law of nations, into foreign lands and distant climes. But his privileges and immunities as a citizen of the state abroad depend upon courtesy and comity. The provision did not define or create those rights termed the "privileges" and "immunities" of citizens of the state. The power to do so is among those reserved to the people, to be exercised by the states, according to the will of its people, expressed in constitutions and laws. This provision does not limit the power of the state as to the establishment of courts or other tribunals, or as to the modes of procedure in them. It has no application to jury trials in state courts. *Slaughter-House Cases*, 16 Wall. 36.

It is further insisted that section 10 of the state constitution is within the limitation imposed by the third clause of section 1, above quoted, which declares that no state shall "deprive any person of life, liberty, or property without due process of law"; that this language entitled a person on trial charged with a crime against a state law to a common-law jury,—12 jurors. We have seen that article 6 of the amendments mentioned, guar-

antying a jury trial in criminal cases, does not mention the number of jurors necessary to constitute a jury; nor does it apply to trials in state courts. "Due process of law" is a general expression, and is equivalent to "law of the land." It permits the deprivation of life, liberty, or property according to law, not otherwise. It shields such rights from arbitrary power. Due process of law in a case like this requires a law describing the offense. The offense must be described in an accusation. The accused must be given his day in court. His trial must proceed according to established procedure, consisting of rules of pleading and practice. The admission of evidence for and against him must be according to established rules, and he must be convicted by the judgment of a competent court, and the punishment authorized by law. The definition of the offense, and the authority for every step in the trial, must be found in the law of the land. Nothing essential can emanate from arbitrary power. The rights of the defendant and the duty of the court are equally under the finger of the law. But the law defining crime, the rules of evidence, or the procedure, may be changed by competent authority, constitutional authority, or common law. It will not be denied that the common law requiring 12 jurors can be changed by the people of the United States by amending their constitution. And the question is: Have they, by the constitutional provision under consideration, prohibited the people of the state from reducing the number of jurors from 12 to 8? Have they, in using the phrase "due process of law," deprived the people of the state of Utah of the power to reduce the number of jurors in the trial of a felony to 8? They have assumed to do so, and we must presume that they believed the jury they provided most suitable and best calculated, under existing and

probable conditions, to discharge the duties of a jury. The purpose of the provision relied upon was to secure the rights to life, liberty, and property, and the benefits of just laws. If a jury of 8 men is as likely to ascertain the truth as 12, that number secures the end. There can be no magic in the number 12, though hallowed by time. Intelligence, impartiality, and integrity are the qualities that will enable and influence jurors to ascertain and declare the truth. Such a result does not depend upon any particular number. Legal process must submit to reform, in the light of experience and advancing intelligence. True principles must endure, but the methods, modes, and means of securing their application to human conduct, human rights and duties,—the social system,—will change with development and progress and more complicated conditions. We are of the opinion that the people of the state had the power, in the constitution, to abolish the common-law jury, or to change it as they have done in the section of their constitution above quoted.

In *Walker v. Sauvinet*, 92 U. S. 90, the court said: "A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden by the fourteenth amendment to abridge. A state cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee v. Improvement Co.*, 18 How. 280. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law

is only to determine whether it is in conflict with the supreme law of the land,—that is to say, with the constitution and laws of the United States made in pursuance thereof,—or with any treaty made under the authority of the United States.” *Ordronaux*, Const. Lim. p. 261; *Hurtado v. California*, 110 U. S. 517.

The defendant was convicted of an offense committed on the 22d day of September, 1895, and section 10 of article 1 of the constitution of Utah went into effect on the 4th day of January, 1896; and it is also urged that it is an *ex post facto* law, and of no effect as to that offense. The defendant was tried on April 7, 1896; and the question is: Did the reduction of the number of jurors from 12 to 8, on the 4th of January, after the offense was committed, deprive the defendant of a substantial right? The law defining the offense, imposing the punishment, or the rules of evidence, was not changed. The tribunal for the trial was altered. Whether the alteration was prejudicial to the defendant cannot be known. We cannot infer that the jury who tried the case did not understand the evidence and the charge of the court, and impartially decide; that they did not reach as correct a verdict as 12 jurors would have reached. The law in force at the time of the trial threw around the defendant all the substantial protection that the law at the time of the commission of the offense did. The change complained of related to an instrumentality employed in the pursuit of the remedy. To investigate the evidence, the law employed a jury. We are of the opinion that the provision of the state constitution complained of was not *ex post facto*, and inapplicable to the offense charged against the defendant.

Judge Cooley, in his work on Constitutional Limitations (6th Ed. pp. 326, 327), lays down the law in these

words: "But, so far as mere modes of procedure are concerned, a party has no more right in a criminal than in a civil action to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts, in existence when the facts arose. The legislature may abolish courts, and create new ones, and it may prescribe altogether different modes of procedure, in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as, doubtless, would be any similar statute, calculated merely to improve the remedy, and, in its operation, working no injustice to the defendant, and depriving him of no substantial right." In his work on Statutory Construction (section 469), Judge Sutherland says: "Acts for transferring criminal cases to another court, or providing a new tribunal, or giving a new jurisdiction, to try offenses already committed, do not abridge any right, and are not *ex post facto*. When the offense was committed, the jury was, by statute, judge of the law. This act was repealed before the trial. Such change, as applied to that case, was held not *ex post facto*. Nor are treaties which provide for surrender of persons charged with previous offenses; nor statutes giving additional challenges to the government; statutes reducing the defendant's peremptory challenges, or modifying the grounds of challenges for cause;



statutes authorizing amendments to indictments; statutes regulating the framing of indictments, with a view to exclude redundancies, and reduce them to essential allegations; statutes to generally facilitate the routine of procedure, and preclude defendants from taking advantage of mere technicalities, which do not prejudice them. Where there has been a legal conviction, but an erroneous judgment thereon, which resulted, according to the law, in a discharge of the convict on reversal of the judgment, a law enacted subsequent to the commission of the crime, that, on such a reversal, the court in which the conviction was had should, on return of the record, pass such sentence thereon as the appellate court should direct, was not an *ex post facto* law." *Marion v. State*, 20 Neb. 233; *Gut v. State*, 9 Wall. 35; *Duncan v. Missouri*, 152 U. S. 377; *Calder v. Bull*, 3 Dall. 386.

Upon examination of the record, we find no error in the ruling of the court admitting evidence objected to by the defendant, or in the portions of the charge excepted to. We do not deem it necessary to particularly examine in this opinion such alleged errors. We find no errors against the defendant in this record. Therefore the judgment of the court below is affirmed.

BARTCH and MINER, JJ., concur.

T. A. WALLEY, RESPONDENT, v. THE DESERET  
NATIONAL BANK, APPELLANT.

BILLS AND NOTES—EXTENSION OF TIME—CONVERSION—WHAT IS—  
MEASURE OF DAMAGES—EVIDENCE—INSOLVENCY—WITNESS—  
EXAMINATION—FINDINGS—SUFFICIENCY—APPEAL—  
REVIEW.

1. A judgment must find its support in the actual state of facts ascertained and reported by the judge in his findings, or fail. No aid can be derived from facts not embodied in the findings.
2. The payment of interest in advance, on a note, by the principal to a creditor, is of itself, without more, sufficient *prima facie* evidence of an agreement to extend the time of payment for the period for which the interest is paid. The payment in advance presupposes that delay of payment of the principal is to be given for that time. The consideration for an agreement for delay in payment is implied from the transaction, if not sufficiently expressed. But this presumption may be overcome by evidence of a refusal to extend, demand of payment, or any other evidence showing that delay or extension was not agreed upon.
3. Section 9, art. 8, of the constitution of Utah, provides that "in equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone." *Held* that, when the testimony presents a question of fact, and the court finds the facts against one of the parties, such findings will not be disturbed by the supreme court if there is evidence to support the finding.
4. In an action in trover, for the conversion of promissory notes on December 16, 1893, wherein defendant was confined in his proof of the value of the notes at a date prior to the alleged date of conversion, the plaintiff, in his rebutting case, introduced testimony, under objection, that defendant sold the judgment obtained upon the notes, after the alleged conversion, demand, and refusal, and after commencement of suit,

14 UTAH—20

14	305
15	466
16	467
14	305
16	240
18	316
14	305
24	224
14	305
25	92

in January, 1894, for their face value. *Held*, that the owner is *prima facie* entitled to recover their face value,—that is, their presumptive value,—and he will be entitled to recover their actual value, if shown. But the defendant has the right to show, in reduction of damages, the payment in whole or in part, the inability of the maker to pay, a release, invalidity of the instrument, or any other matter, which would legitimately affect or diminish their value, and that the proper measure of damages is the cash value of such notes at the time of the conversion, with interest to the time of trial. *Held*, further, that the fact that the purchaser of the notes sold the judgment which he had obtained upon them six months after the actual conversion, and after the commencement of the action, for its face value, would not take the case out of the rule, and that it was error to admit such testimony, especially as the undisputed facts show that a wrongful conversion of the notes occurred on June 16, 1893, more than six months before the sale of the judgment, at a time when the defendant traded the notes for bank stock in violation of the condition of the contract, which provided that the notes should be sold at public or private sale in case of default in payment of the principal note, for which payment the notes in question were pledged.

5. After a witness has been examined in chief, and given testimony tending to show his solvency at a given time, it is error to refuse the opposite party the right, on cross-examination, to show, by the witness, that at a certain time, during the period referred to, he had stated, to a certain person named, that he had no property his creditors could reach, and it would do no good to sue him. Such testimony would affect the credit of the witness, and tend to contradict and qualify his testimony in chief, and was also proper, laying the foundation for impeachment.
6. Neglect and refusal of a maker to pay his note at maturity tends to show his inability to pay, and affects the value of his note.
7. A proper return of an execution *nulla bona*, issued upon a valid judgment rendered against the maker of a note, is *prima facie* evidence of insolvency of the maker.
8. When promissory notes were given in pledge to secure payment of plaintiff's note at maturity, with a right to sell the

pledged notes on default of payment, at public or private sale, without notice, and it appears that, before the principal note became due, the pledgee traded the pledged notes for bank stock, *held*, that this amounted to a wrongful conversion of the notes at the time the trade was made.

9. The refusal to surrender possession in response to a demand, is not, of itself, a conversion. It is only evidence of a conversion, and, like other inconclusive acts, is open to explanation.
10. A special finding that certain notes had no market value at a given time, when all the testimony given tended to show the notes had a market value of a specified amount at that time, is not supported by the evidence.
11. A general finding that the notes in question were worth their face value on a given date, and a special finding that such notes had no market value on that date, when the testimony supports the latter finding, renders the finding objectionable. Facts of an equivocal import cannot well be reduced to a certainty by conjecture. A finding should afford the means of its own interpretation, and for fixing its own sense, and should be sufficiently distinct and definite to enable the court to decide upon the judgment.
12. When promissory notes have a market value, it is competent to show what the cash market value was at the time of the conversion, as bearing upon and tending to fix their actual value. This rule applies to promissory notes and choses in action having a market value, the same as to other personal property.

(No. 741. Decided Dec. 9, 1896.)

Appeal from the Third District Court, Salt Lake county. Hon. John A. Street, *Judge*.

Action by T. A. Walley against the Deseret National Bank for the conversion of two promissory notes deposited as collateral security for a loan. From a judgment for plaintiff, defendant appeals. *Reversed*.

*Young & Moyle and C. S. Varian*, for appellant:

The mere payment of interest in advance is not of itself sufficient to extend the time of the payment of the principal of the note. *Oxford Bank v. Lewis*, 8 Pick. 457; *Blackstone Bank v. Hill*, 10 Pick. 129; *Bank v. Weller*, 17 Pick. 150; *Dow v. Tuttle*, 4 Mass. 414; 3 Randolph Com. Paper, secs. 958, 961, 963; 10 Pet. 257; *Vare v. Woodward*, 29 O. St. 245; 78 Ill. 446; 17 Wend. 501; *Bank v. Rawlins*, 13 Me. 202; Chitty on Bills, 370, 371, 379; 14 Peters 202, 607; *Davy v. Prendergrass*, 5th Barn. & Ald. 187.

"Demand and refusal do not in themselves constitute conversion; but they are evidence of conversion at some previous period." *Wood v. Carson River Wood Co.*, 13 Nev. 61; *Whitman Co. v. Trille*, 4 Nev. 497; *Earl v. Van Benson*, 2 Halst. 244; *Newsom v. Newsom*, 1 Leigh 86, 101; *Reford v. Montgomery*, 7 Ver. 411; *Hews v. McKinney*, 3 Mo. 382; *Cobb v. Wallace*, 5 Cole (Tenn.) 538; *Barker v. Lothrop*, 155 Mass. 376; *Donnahoe v. Williams*, 24 Ark. 264; *Perkins v. Barnes*, 3 Nev. 557; *State v. Patten*, 49 Me. 383; *Hardy v. Keeler*, 15 Ill. 152; *Galvin v. Smith*, 2 Fairfield (Me.) 28; *Hyde v. Noble*, 13 N. H. 494; *Freed v. Anderson*, 10 Mich. 357; *Soames v. Watts*, 1 Carr & Paine 400; *Yates v. Carnsew*, 3 Carr & Paine 100; 1 Chitty on Pleadings, 157, 158; *Woodbury v. Long*, 8 Pick. 543; *Tompkins v. Hale*, 3 Wend. 406; *Stanley v. Gaylord*, 1 Cush. 536; *Riley v. Boston*, 11 Cush. 11-14; 2 Addison on Torts 395.

Where there is no allegation in the complaint of the value of said notes, the market value has to be determined in regard to the real damage done plaintiff. *Galligher v. Jones*, 129 U. S. 193; *Baker v. Drake*, 53 N. Y. 211; 66 N. Y. 518; *Gruman v. Smith*, 81 N. Y. 25; *Colt v. Owen*, 90 N. Y. 368; *Wright v. Bank of Metropolis*, 110 N. Y. 237; *McEawan v. Morley*, 60 Ill. 32; *Kauntz v. Kirkpatrick*, 72 Penn. St. 376; 2 Benj. on Sales, 1017; Id. 35.

The fact that execution has been returned *nulla bona* is proof of insolvency. *Phillips v. Webster*, 85 Ill. 146; *Brown*

v. *Brooks*, 25 Pa. 210; *Buttram v. Jackson*, 32 Ga. 409; *Rice*, vol. 2, p. 220*e* and *f*; see 29 Kan. 689.

*Jones & Schroeder*, for respondent:

Payment and acceptance of interest constitutes of itself such an agreement for the extension of time until the expiration of the period for which interest is thus paid in advance. *Warner v. Campbell*, 26 Ill. 286; *N. H. Savings Bank v. Fla.*, 11 N. H. 341; *People's Bank v. Pearson*, 30 Vt. 715; *Lemon v. Whitman*, 75 Ind. 325; *Hollingsworth v. Tomlinson*, 108 N. C. 245; *Flynn v. Mudd*, 27 Ill. 327; 30 Miss. 436; 37 Ga. 384; 6 Bush. (Ken.) 556; 43 Ind. 393; 50 Ind. 378; 20 S. E. (Ga.) 266; 10 Humph. (Tenn.) 447; 10 N. H. 322.

In *Baker v. Drake* (53 N. Y. 216), which is the recognized leading case on the measure of damages, in an action like this, the court says: "*An amount sufficient to indemnify the party injured for the loss, which is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the complainant would not have averted is the measure of damages.*" See 13 N. Y. Sup. 826, in cases. *Green v. Boston R. R. Co.*, 35 Am. Rep. 371; *Ripley v. Davis*, 90 Am. Dec. 262.

MINER, J.:

On the 18th day of December, 1893, plaintiff filed his complaint for the alleged conversion by the defendant of two certain promissory notes, made by John Beck, one for \$5,000, and one for \$1,000, both dated April 1, 1892, payable April 1, 1893, and alleged that on the 16th day of December, 1893, he was the owner of said notes, and on that day defendant unlawfully disposed of and converted the same to its own use. The defendant answered, denying plaintiff's ownership of the notes, or its conversion of

the same, and alleged that on September 6, 1892, plaintiff gave his note to defendant for \$1,000, with interest at 1 per cent. per month, and secured the payment of the same by pledging the notes of Beck; that the note provides that, in case of default in payment, the defendant should sell said pledged notes at public or private sale, with or without notice, in payment of the \$1,000 note; that said principal note fell due on April 1, 1893, and was not paid, and that on the 16th day of June, 1893, defendant sold said pledged notes to James T. Little, he being the highest bidder, for the sum of \$1,000, which was credited upon plaintiff's note, and that afterwards Little tendered said notes to plaintiff on payment of the principal note; that the price for which the notes were sold on June 16, 1893, was all that they were worth in that year. The case was tried before the court without a jury, whereupon the court made its findings of fact and conclusions of law; and also special findings, and rendered judgment in favor of the plaintiff in the sum of \$5,381.67, with interest thereon at 8 per cent. from December 16, 1893, amounting to the total sum of \$6,376.37. From this judgment defendant appeals to this court.

In the course of argument, and in the briefs of counsel, the question as to the effect of the sale of the Beck notes to James T. Little, as an officer of the bank, is discussed to a considerable extent; but, upon an examination, we discover no finding that Little was an officer of the bank, or in any way connected with it at the time, and therefore refrain from passing upon the questions involved in that subject. The judgment must find its support in the actual state of facts ascertained and reported by the judge, or fail. No aid can be derived from facts not embodied in the findings. *Brown v. McHugh*, 36 Mich. 433.

The note of \$1,000, given by plaintiff to the bank, September 6, 1892, due April 1, 1893, for which the Beck notes were pledged as security, gave the defendant the full authority to sell said Beck notes, at public or private sale, upon non-performance of the promise to pay at maturity, and without notice. The interest was paid upon the note to the 6th day of April, 1893. On April 27, 1893, plaintiff paid \$10, and on June 3, 1893, \$10, and both payments were made and indorsed as interest. On June 10, 1893, plaintiff paid \$10 to defendant. The court found that the last payment paid the interest for the month of June, 1893, and that the time for the payment of the principal note was extended beyond the 16th day of June, 1893. On the 16th day of June, 1893, defendant sold or exchanged the Beck notes to Little for \$1,000, and applied the same to the payment of plaintiff's note, and at once notified the plaintiff of the sale, and at the same time returned to the plaintiff \$7 overpaid, which plaintiff refused to accept. On December 16, 1893, plaintiff made tender of the amount due on the principal note, and made demand for the Beck notes. The court found that the plaintiff was insolvent. This suit was brought on the 18th day of December, 1893. There is a conflict in the evidence as to the purpose of the last payment of \$10. The court found that it was paid as interest, and that the note was therefore extended beyond the time when the bank sold the note to Little because of the non-payment of the principal note when due. The plaintiff testified, in substance, that he went to the bank on June 10, 1893, when he made the last payment of \$10. The president, Mr. Hills, said "he wanted my note paid as soon as I could. Nothing was said about the extension of time when I made this payment. I had previously paid \$10 at different times each month. At the last payment



I said, 'Here is the interest, Mr. Hills,' and he said, 'All right,' and took the money." Mr. Hills testified that, when the plaintiff made the last payment of \$10, he told him he would endorse the payment, but would not extend the time. When the last payment was made, he says, "I told the plaintiff we would have to have the whole note paid or sell the collateral. Plaintiff replied that he was not prepared to pay the note then. I did not agree to extend the time of payment at any time. It was not the custom of the bank to extend payments without making an entry showing it." The court found that the time for payment of the plaintiff's note was extended beyond June 16, 1893. The only evidence to support this finding is that the payment of interest on June 10th was made in advance, which covered the period when the bank sold the collateral notes to Little, and that the interest so paid was at the rate of 1 per cent. per month, as borne by the plaintiff's note, before the same was due; plaintiff claiming that the note only drew 8 per cent. after it was due, and that the extra interest was a consideration for the extension. The decided weight of authority, and, it seems, the better reason, is that the payment of interest in advance on a debt by the principal to the creditor is of itself, without more, sufficient *prima facie* evidence of an agreement to extend the time of payment for the period for which the interest is paid. The payment in advance pre-supposes that delay of the payment of the principal is to be given for that time. The consideration for an agreement for delay in payment is implied from the transaction, if not sufficiently expressed. But this presumption may be overcome by evidence of a refusal to extend, demand of payment, or any other evidence showing that delay or extension was not agreed upon. Brandt, Sur. § 352; *Bank v. Truesdell*,

55 Barb. 603; *Walters v. Swallow*, 6 Whart. 449; *Warner v. Campbell*, 26 Ill. 286; *Bank v. Pearsons*, 30 Vt. 710.

The testimony offered on both sides left a question of fact, to be decided by the court. The court found the fact against the defendant.

Section 9 of article 8 of the constitution of Utah provides that "in equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone." While we might be able to reach a different conclusion from the trial court upon the correctness of this finding, yet, as the appeal brings up the question of law alone; and there is some evidence in the record tending to sustain the finding, we do not feel satisfied to disturb the finding on this subject.

The demand, refusal, and conversion are alleged to have been made December 16, 1893. The bank traded the notes June 16th. The defendant was limited in his proof of the market value of the notes and the insolvency of the maker to a period between the 16th day of June, and the 16th day of December, 1893, the date of the alleged conversion, and was precluded from showing their value or Beck's insolvency in 1894. The plaintiff, in his rebutting case, called Mr. Little as his witness, and, under objection that the testimony was incompetent, immaterial, and irrelevant, was allowed to show that, after the suit was commenced, and after the alleged conversion, and on January 6, 1894, he sold the judgment he obtained upon the notes in question to a syndicate of people who purchased it at its face value in order to protect their interests in the property levied upon; the property levied upon being Beck's equity of redemption in the stock of a mine. Exception was taken to the admission of this testimony; also, to the refusal of the court to permit the defendant to show, on cross-examination of the same

witness, that Beck could not pay the judgment at this time, and that he was financially embarrassed, and that, but for the intervention of the syndicate named, the judgment would not have been paid. The question is, was the testimony of Little admissible as to these facts, occurring in January, 1894? In *Kennedy v. Whitwell*, 4 Pick. 466, the court held that, "in trover, the value of the article at the time of the conversion, with interest from that time to the time of the trial, is the measure of damages, and the facts, that before the conversion the plaintiff, as vendee, paid the defendant for the article, and the defendant, before the trial, re-sold it at an advanced price, do not take the case out of the rule." *Bates v. Stansell*, 19 Mich. 91. Sedgwick states the general rule to be: "In actions for the conversion of personal property, the measure of damages is the value of the property at the time of the conversion with interest to the time of trial." 2 Sedg. Dam. §§ 493-497; *Dows v. Bank*, 91 U. S. 618; *Tyng v. Warehouse Co.*, 58 N. Y. 308; 3 Suth. Dam. pp. 520-522, 482; *Robinson v. Hurley*, 11 Iowa 410.

For the conversion of money securities the owner is, *prima facie*, entitled to their face value,—that is, their presumptive value,—and he will be entitled to recover their actual value if shown; but the defendant has the right to show, in reduction of damages, the payment in whole or in part, the inability of the maker to pay, a release, invalidity of the instrument, or any other matter which will legitimately affect or diminish its value, and the proper measure of damages is the value of such securities at the time of the conversion, with interest to the time of trial. 3 Suth. Dam. pp. 520-522; 1 Sedg. Dam. §§ 256, 257; 5 Am. & Eng. Enc. Law, p. 40; *Stirling v. Garri-tee*, 18 Md. 468; *Insurance Co. v. Dalrymple*, 25 Md. 244.

So it is held that the market value of the stock at the

time of the conversion is the proper measure of damages. *Bank v. Boyd*, 44 Md. 47; *Sturges v. Keith*, 57 Ill. 451; *McKenney v. Haines*, 63 Me. 74; *Fisher v. Brown*, 104 Mass. 259; *Spencer v. Vance*, 57 Mo. 427.

In New York and several other states the old rule of assessing damages, in cases of conversion of stocks which have a fluctuating value, at the highest market price from the time of conversion to the time of trial, is held to be without reason; and the supreme court, in the case of *Baker v. Drake*, 53 N. Y. 211, has seen fit to change the rule, and hold that a fixed, unqualified rule, giving the plaintiff, in all cases of conversion of property, the highest market price from the time of the conversion to the time of trial, cannot be upheld upon any sound principle of reason or justice, and that such doctrine cannot be regarded as one of those settled rules to which the principles of *stare decisis* should apply, and that the market price of stocks from the time of sale to a reasonable time after notice of sale affords a complete indemnity, and is the proper measure of damages in such cases.

The supreme court of the United States, in *Galigher v. Jones*, 129 U. S. 193, a case appealed from the supreme court of Utah, reported in 3 Utah 54, hold, with New York, that, in trover for the conversion of stocks having a fluctuating value, the proper rule for damages is the highest intermediate value between the time of conversion and a reasonable time after the owner has received notice of it, to enable him to replace the stock. The court further says: "Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time, and hence, with regard to them, the ordinary measure of damages is their value at the time of the conversion, or, in case of sale and purchase, at the time fixed for their delivery. But the

application of this rule to stocks would, as before said, be very inadequate and unjust."

A plaintiff's right of recovery must be deemed fixed at some time, and he should not be permitted to wait for an indefinite period, and speculate upon the changes in the market, while taking upon himself none of the risks of a decline in the value of the article converted. This would put him in a better position than if he had the property in possession. If the plaintiff had not lost his title to the property, he had the option of following and recovering it. But by bringing this action of trover he seeks to recover damages for the conversion. By the conversion he was deprived of the property, and a claim for the value of it took its place. Consequently, that value at the time of the conversion, with interest, should be the limit of his recovery. If the property, or the probability of collection of the judgment obtained upon the notes, had been increased because of the extra efforts, care, research, and expense bestowed by the purchaser of the notes, or his paid attorneys, in uncovering concealed or hypothecated property of the maker, so as to make the collection possible six months after the conversion, after the commencement of this suit, and after the purchaser had tendered the property back to the plaintiff, this increased value should not inure to the benefit of the plaintiff. 2 Sedg. Dam. § 499. It would be almost impossible to review and reconcile the many conflicting opinions that have been delivered upon this subject. We are inclined to adopt the rule that the measure of damages, in cases of this character, is the value of the property at the time of the conversion, with interest thereon to the time of the trial. It will be remembered that the bank sold and traded the collateral notes to Little on June 16, 1893, and that the plaintiff had notice of the sale at that

time. Little testified that he offered the notes back to the plaintiff several times during the summer of 1893, on payment of the \$1,000 and interest, which offer was not accepted. Mr. Hills testified that he tendered the notes back to plaintiff three days after the demand was made in December, 1893; but there is a conflict on this point. This suit was brought December 18, 1893, about six months after plaintiff had notice of the sale of the collateral notes to Little. We are inclined to the view that the admission of the proof as to what Little received for the judgment from the syndicate, with which Beck had nothing to do, at a time over six months after the sale or trade of the notes with plaintiff's knowledge, and after demand, refusal, and alleged conversion by the bank, and after the commencement of this action, was error. *Kennedy v. Whitwell*, 4 Pick. 466; *Bates v. Stansell*, 19 Mich. 91; 2 Sedg. Dam. 499. If the admission of this testimony was proper, then the defendant had the right to show, on cross-examination of Little, the facts attending the assignment of the judgment, and that Beck was insolvent at that time. It is apparent, from the statements of counsel, that the court took this evidence into consideration in making its findings.

The next question to be considered is the question of damages arising from the alleged conversion of the Beck notes, and the errors assigned upon the admission and rejection of testimony with reference to Beck's solvency. At the trial the court limited the defendant's proof as to the value of Beck's notes and the solvency of Beck to a period between the 16th day of June, 1893, the day of the sale of the notes by the bank to Little, and the 16th day of December, 1893, the time of the alleged conversion, tender, and demand of the Beck notes by the plaintiff.

The defendant had introduced testimony of several witnesses tending to show that the market value of Beck's notes between these dates was from 1 to 16 cents on the dollar, and that Beck was insolvent and unable to pay his debts, and was under serious financial embarrassment during that period; that several judgments against him remained unpaid; and that the notes could not be collected. The plaintiff, in his rebutting case, offered as a witness John Beck, the maker of the Beck notes, who gave testimony tending to show that he owned property liable to execution, and that he was solvent, although hard pressed for funds, during that period. Upon the cross-examination of Mr. Beck by the attorney for defendant, the following question was propounded to him: "Q. I will ask you whether, between June, 1893, and December, 1893, you did not tell me, in your office, when I went there with a claim for some Eastern people, that it would do no good to sue you,—that you had no property that your creditors could reach?" The question was objected to, the answer was excluded, and an exception taken. We think this question was proper, and should have been answered. Mr. Beck had given testimony tending to show his solvency and ability to pay his debts. The question was pertinent to the issue. If he made such a statement concerning his property and want of financial ability, it was proper the court should know it, as affecting his credit as a witness, and as contradicting and qualifying his testimony in chief, and also as laying the foundation for impeachment. We think the court erred in sustaining the objection. Other questions of a similar character were asked, and the answers excluded. Whether Mr. Beck was solvent at that time, and was able and disposed to pay his debts, and had property that

his creditors could reach upon execution, was one of the principal questions to be determined, in order to ascertain the value of his notes. In a case of this character, where the plaintiff was seeking to recover in trover for the value of the Beck notes, alleged to have been converted by the defendant, the plaintiff was *prima facie* entitled to recover the face value of the notes at the time of the conversion, with interest, upon showing ownership and conversion of the paper. But it was competent for the defendant, in his defense, to show, in reduction of damages, the insolvency and inability of the maker to pay, or any other matter which would legitimately affect or diminish their value, or which would tend to show insolvency and want of business integrity. 1 Sedg. Dam. § 256; 3 Suth. Dam. pp. 520-522. Under this rule, the neglect or refusal of the maker to pay his note at maturity is evidence tending to show his inability to pay; and such testimony was competent to be shown for the purpose of reducing the damages, and as affecting the value of the notes. *Booth v. Powers*, 56 N. Y. 22; *Brown v. Montgomery*, 20 N. Y. 287; *Terry v. Allis*, 20 Wis. 35; *King v. Ham*, 6 Allen 298.

The fact that Beck kept his property concealed or covered up in the name of other parties, where it could not be found or reached by execution, if shown, would tend to affect the value of his paper, was proper testimony, and should have been admitted. So the proper return of executions *nulla bona*, issued upon a valid judgment against Beck, were *prima facie* evidence of his insolvency at the time. *Phillips v. Webster*, 85 Ill. 146; *Brown v. Brooks*, 25 Pa. St. 210.

The appellant also contends that there is no evidence to support the finding that the defendant converted the notes to his own use on December 16, 1893, that being



the time of the alleged demand and refusal. The testimony and findings show that the pledged notes were traded by the bank to Little, June 16, 1893, and due notice given to plaintiff of the sale at that time. The defendant came into possession of the notes lawfully, as a pledge and security for the payment of plaintiff's note. The court found that the payment of plaintiff's note was extended beyond June 16, 1893, by the payment of interest beyond that date, and that plaintiff's note was not due at the time defendant sold or traded it for bank stock to Little. Therefore, the sale or trading of the collateral notes before the maturity of the principal note was unlawful and wrongful, and no demand or refusal was necessary. If the notes were converted at all by the defendant, the conversion took place at the time it made an absolute trade and wrongful disposition of them, of which plaintiff had immediate notice. "The refusal to surrender possession in response to a demand is not, of itself, a conversion. It is only evidence of a conversion, and, like other inconclusive acts, is open to explanation." Cooley, Torts, pp. 530-532; Cooley, Elem. Torts, pp. 181, 182; 2 Add. Torts, 395-398; *Insurance Co. v. Dalrymple*, 25 Md. 269; Story, Bailm. § 349; 1 Chit. Pl. 157, 158; *Ward v. Wood Co.*, 13 Nev. 44; *Mining Co. v. Tritle*, 4 Nev. 497; *Trudo v. Anderson*, 10 Mich. 357; *Howitt v. Estelle*, 92 Ill. 218; *Buntin v. Pritchett*, 85 Ind. 247; *Hake v. Buell*, 50 Mich. 89.

If defendant had not the actual or constructive possession of the property at the time of the demand, and therefore could not deliver it, his liability would not be affected by the demand and refusal; for, if he had been guilty of the conversion before, no demand was necessary, and, if he had not been, a failure to do what, for any reason, he was unable to do, could not render him so.

Cooley, Torts, p. 532. It is held, in *Tyng v. Warehouse Co.*, 58 N. Y. 315, in an action for the conversion of bonds, "that the conversion took place when the defendant wrongfully sold the bonds, and the measure of damages was their value at the time of sale." *Insurance Co. v Dalrymple*, 25 Md. 269; *Henshaw v. Bank*, 10 Gray 568; *Bank v. Boyd*, 44 Md. 47. We are of the opinion that the court was in error in finding that the defendant converted the notes to its own use on December 16, 1893.

Appellant contends that the findings of the court are inconsistent and contradictory in this: That in general finding No. 3 the court found that on the 16th day of December, 1893, the defendant unlawfully disposed of and converted to its own use the two Beck notes, to the damage of the plaintiff in the sum of \$6,435, this sum being the value of said notes on that date; that in special finding No. 8 the court found that there was no market value to said Beck notes on the said 16th day of December, 1893, that being the day on which the alleged conversion took place, and in special finding No. 6 the court found that there was no market value to Beck's notes on the 16th day of June, 1893; that the special findings control, and that those findings do not support the judgment, but are contradictory and inconsistent with it; and that special finding No. 8 is contrary to the evidence, and is not supported by it. The value of the notes on December 16, 1893, is fixed at their full face and interest, while they are held to have no market value on that date. The court permitted the defendant to show that the notes had a market value, and that such market value was from 1 to 16 cents on the dollar between June 16 and December 16, 1893, and that Beck was insolvent, as bearing upon the value of the notes, but declined to allow defendant to show such value after these dates, as too remote

from the date of conversion. If they had no market value, it was still competent for the defendant to show, in reduction of damages, the inability of the maker to pay, his insolvency, or any other matter which would legitimately affect or diminish the value of the notes at the time of conversion. *Bank v. Boyd*, 44 Md. 47; *Sturges v. Keith*, 57 Ill. 451; *McKenney v. Haines*, 63 Me. 74; *Fisher v. Brown*, 104 Mass. 259; *Spencer v. Vance*, 57 Mo. 427; 1 Sedg. Dam. §§ 256, 257, 357, 244, 497, 5 Am. & Eng. Enc. Law, p. 40; 3 Suth. Dam. 488, 491, 496; *Boylan v. Huguet*, 8 Nev. 345; *Brown v. Allen*, 35 Iowa 306; *Galigher v. Jones*, 129 U. S. 193; *Baker v. Drake*, 53 N. Y. 211; *Ormsby v. Mining Co.*, 56 N. Y. 623; *Deck's Adm'r v. Feld*, 38 Mo. App. 674; *Tyng v. Warehouse Co.*, 58 N. Y. 308.

The testimony given bore upon the value of the notes, and tended to fix such value. The object and purpose of such testimony was to inform the court what the value of the notes was, so that the court could render a judgment for that value. When the value was found, and judgment rendered, the parties had a right to know, from the findings, what the ultimate facts were upon which the judgment was rendered. Such findings should be consistent, and support the judgment, and leave nothing to conjecture. The court found, in its general findings, that the value of the notes on December 16, 1893, was \$6,435, and afterwards made its special findings that such notes had no market value on December 16, 1893. The evidence on the part of the defendant tended to show the market value of the notes to be from 1 to 16 cents on the dollar at this time, and no evidence of the market value was offered by the plaintiff. Special findings control the general findings on the same subject, where there is a conflict between them. *Hidden v. Jordan*, 28 Cal. 302; *Reese v. Corcoran*, 52 Cal. 495; *Sloss v. Allman*, 64 Cal.

47; *Harris v. Harris*, 59 Cal. 620; *Manly v. Howlett*, 55 Cal. 95; *Burk v. Webb*, 32 Mich. 173; *Delashman v. Berry*, 20 Mich. 292; *Brown v. McHugh*, 36 Mich. 433.

The cash market value of an article having a market value is usually the test of its value. This test, however, may not in all cases apply to commercial paper. In some cases such paper may be comparatively worthless in the market, and still have its intrinsic face value; while in other cases it may have its face market value, but be of no intrinsic value. The value in either case may be shown, as fixing the true value. We are of the opinion that the findings should have been more explicit, and have left less room for apparent contradiction and conjecture. The finding that the notes had no market value was against the evidence, and was not supported by it. Facts of an equivocal import cannot well be reduced to a certainty by conjecture. A finding should afford the means for its own interpretation, and for fixing its own sense, and should be sufficiently distinct and definite to enable the court to decide upon the judgment. *Brown v. McHugh*, 36 Mich. 435.

The judgment of the district court is set aside and reversed, with costs, and a new trial granted.

ZANE, C. J., and BARTCH, J., concur.

A. H. HENNEFER, REBECCA A. BUNCE, JAMES McLAUGHLIN, AND CELIA M. CAMPBELL, RESPONDENTS, *v.* JENNIE E. HAYS, APPELLANT.

PLEADING AND PROOF—FINDINGS—WITNESS—TRANSACTIONS WITH DECEDENT.

1. It is error to grant a decree quieting plaintiff's title on proof of facts showing a right to specific performance simply.
2. Unless the findings embrace all the facts essential to the cause of action set up in the complaint, a decree for the plaintiff based thereon is erroneous.
3. A party to an action to establish his interest in the estate of a deceased person cannot testify, in his own behalf, to any conversation or transaction equally within his own knowledge and the knowledge of the person since deceased, when the opposite party sues or defends as heir of such deceased person.

(No. 670. Decided Dec. 10, 1896.)

Appeal from the Third district court, Territory of Utah.  
Hon. S. A. Merritt, *Judge*.

Action by A. H. Hennefer, Rebecca A. Bunce, James McLaughlin, and Celia M. Campbell against Jennie Hays. The actions were tried together. From a decree for plaintiffs, defendant appeals. *Reversed*.

*S. P. Armstrong*, for appellant.

*Loofbourow & Kahn*, *S. W. Darke*, and *James M. Denny*, for respondents.

No briefs were filed.

ZANE, C. J.:

These four cases were tried before a referee. The parties stipulated before trial that they should be heard together, and that the evidence taken should be received in each, so far as competent, relevant, and material, and that the findings of fact and conclusions of law should be made a part of the record in each case. It appears from the record that the late Abraham Hays was, in the year 1886, the owner of a part of lot 2 in block 6, plat B of Salt Lake City survey, more accurately described in the record; that he died on the 14th day of December of that year; and that his wife, Sarah Hays, and five grandchildren, namely, A. H. Hennefer, William H. Hennefer, Rebecca A. Bunce, and Edward E. Hennefer, children of a deceased daughter, and Jennie E. Hays, defendant, daughter of a deceased son, survived him; and that the plaintiffs McLaughlin and Campbell obtained interests in the land from William H. Hennefer and Mrs. Bunce. The plaintiffs A. H. Hennefer and Rebecca A. Bunce allege in their complaints an unwritten, executory contract, between Abraham Hays and the four grandchildren first above named, and possession under the contract, and valuable improvements and performance on their part, and they pray the court to grant them specific performance; while the plaintiffs McLaughlin and Campbell base their cause of action on the statute of limitations simply, acquired, as alleged, by adverse possession and payment of taxes for seven years, and they asked the court to quiet their titles. The referee found the existence of the verbal contract between Abraham Hays and the four grandchildren first named, and possession under and performance of it on their part. As to the allegations in the complaint of McLaughlin and Campbell, of possession and payment of taxes for seven years before action was brought, the referee found

adverse possession for about three years and six months, and made no finding as to the payment of taxes. But he states, as a conclusion of law, that each of the plaintiffs is entitled to a decree quieting his title. So it appears that the referee found the existence of the facts set up to show a right to specific performance in the complaints of Hennefer and Bunce, but did not find adverse possession and payment of taxes, alleged in the complaints of McLaughlin and Campbell, to show their right to have their titles quieted. The referee found the facts stated in the two first complaints, but stated, as a conclusion of law, that all the plaintiffs were entitled to decrees according to the prayer of the two complaints containing the facts not found. Upon these findings, decrees were granted in the respective cases, quieting the titles of the respective parties; and a motion for a new trial in each case having been denied, and exceptions taken, the defendant appealed from such decrees and the orders overruling her motions for a new trial, and assigns said respective orders and decrees as error.

From this statement it is apparent that the findings were not responsive and applicable to the causes of action alleged in the complaints of James McLaughlin and Celia M. Campbell, and that the conclusions of law and the decrees were not responsive to the causes of action alleged in the complaints of A. H. Hennefer and Rebecca A. Bunce, and that the conclusions of law did not follow from the facts found. We therefore hold that the court below erred in the findings of fact as to the cases of McLaughlin and Campbell, and in stating its conclusions of law, and in the decrees and orders overruling defendant's motion for a new trial in the respective cases.

On the trial, A. H. Hennefer, a plaintiff, and one of the parties to the contract with Abraham Hays, deceased, of which the court was asked to decree specific perform-

ance against the defendant, was permitted to testify, against her objection. The testimony consisted of statements of the deceased, which, with the promises of the grandchildren above named, it is claimed, constituted the contract relied on. The defendant was an heir and a party, and the statements were equally within the knowledge of the witness, who was also a party, and the deceased ancestor. We are of the opinion that this testimony was inadmissible, under section 1, c. 31, p. 26, Laws Utah 1894, which declares that "a party to any civil action, suit, or proceeding, and any person directly interested in the event thereof, and any person from, through, or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party in such action, suit or proceeding, claims or opposes, sues or defends as guardian of any insane or incompetent person, or as the executor or administrator, heir, legatee or devisee of any deceased person, or as guardian, or assignee or grantee, directly or remotely, of such heir, legatee or devisee as to any statement by, or transaction with, such deceased, insane or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent or deceased person, unless such witness be called to testify thereto by such adverse party, so claiming or opposing, suing or defending in such action, suit or proceeding." The case of *In re Atwood's Estate*, 14 Utah 1, we regard as decisive of this point.

For the reasons stated, the orders and decrees appealed from are reversed, and the court below is directed to grant a new trial, and to give the respective plaintiffs leave to amend their complaints.

BARTON and MINER, JJ., concur.



EMERY COUNTY, APPELLANT, v. P. C. BURRESEN,  
RESPONDENT.

EXECUTION AGAINST A COUNTY—EXEMPTIONS—MANDAMUS—AUDITED  
CLAIM.

1. K. brought suit against Emery county for services, and obtained judgment before a justice of the peace, and afterwards levied execution on property of the county, and sold it. Emery county then commenced suit against K. and the sheriff for conversion of the property. *Held*, that a county is one of the political divisions of a state, and is clothed with certain political power of government of its local affairs.
2. Section 3419, Comp. Laws Utah 1888, giving a party in whose favor judgment is rendered a right to execution; and subdivision 10 of section 3429, exempting certain classes of property from execution against a county,—cannot be extended so as to include the right to levy an execution against the property of the county, state, or municipal organization, in the absence of a statute expressly granting such right in express terms.
3. Under section 199, p. 307, Comp. Laws Utah 1888, a judgment against a county, when duly filed, becomes an audited claim against said county; and plaintiff, in case of failure from lack of funds or refusal to pay the same, can resort to his writ of *mandamus*.

(No. 725. Decided Oct. 22, 1896.)

Appeal from the Seventh district court, Emery county.  
Hon. Jacob Johnson, *Judge*.

Action by Emery county against P. C. Burreson and others. From a judgment for defendants, plaintiff appeals. *Reversed*.

*W. K. Reed and Thurman & Wedgwood*, for appellant.

*J. W. N. Whitecotton*, for respondents.

MINER, J.:

Killpack commenced suit in the justice's court against Emery county for \$6.75, claimed to be due him from the county for fees as justice of the peace, which claim had been presented and disallowed by the county court, and \$25 attorney's fees for trying the case against the county, taxed as costs. Killpack recovered judgment, which, together with costs, amounted to \$52.50. Execution was issued by the justice against Emery county, which was levied by Burresen, the sheriff, upon property of the county, consisting of scrapers, plows, stray brands, etc., and sold the same to satisfy the execution. This action is brought by Emery county against the plaintiff Killpack, who brought the action; Burresen, the sheriff, who took the property; C. P. Anderson, the justice; and C. E. Kofford, the attorney, who advised the suit,—for conspiracy and unlawful conversion of the property of the county, claiming damages of \$324. The respondents justify upon the judgment and execution issued by the justice of the peace. The respondents obtained judgment, and for costs, in the district court, from which judgment the plaintiff Emery county appeals.

The question presented is whether the property of Emery county is liable to be levied upon and sold upon execution, in satisfaction of a judgment obtained against Emery county, one of the political divisions of the state. It appears that the claim, duly itemized, was presented to the county court for allowance before suit, and that it was wholly disallowed; that, after judgment, a certified copy thereof was filed with the county court. The respondents base their right to the issuance, levy, and

sale by execution upon section 3419, Comp. Laws Utah 1888, which gives a party in whose favor judgment is rendered a right to a writ of execution for its enforcement, and upon subdivision 10, § 3429, Id., which exempts certain specified classes of property belonging to the county, not included in the execution and sale, from execution. The nature, objects, and liabilities of political, municipal, or public corporations, like a county in a state, stand upon a different ground from private corporations. A county is one of the political divisions of the state, signifying a community, clothed with such extensive authority and political power as may be deemed necessary by the superior controlling power of the state for the proper government of its people residing within its borders, and for a proper administration of its local affairs. A county can raise revenue by taxation, make public improvements, and defray the expenses of the same by taxation, exercise certain specified judicial powers, and generally act within the authorized sphere created and abridged by the statute or constitution of the state. The power of taxation furnishes the means by which it may pay its debts and meet obligations necessarily incurred for the many purposes of its existence and welfare. The county has control of the county property to be used and disposed of to promote corporate purposes. It does not possess property liable to execution in the same sense that an individual possesses it. Levying upon and selling the property or revenues of a county, or removing it, may work irreparable injury, and ruin its inhabitants.

We are unable to find, nor has our attention been called to, any statute in this state expressly giving authority to levy an execution, and sell property of the county for a debt. It is a general rule that the people or the sover-

eign are not bound by general words in a statute restrictive of a prerogative right, title, or interest, unless expressly named. *People v. Herkimer*, 4 Cow. 345; *Leonard v. City of Brooklyn*, 71 N. Y. 498; *City of Chicago v. Hasley*, 25 Ill. 486; Sedg. St. Const. p. 337.

So, it has been held that, in rendering judgment against a city, it is error to award execution, or to levy it. *City of Morrison v. Hinkson*, 87 Ill. 588; *Klein v. New Orleans*, 99 U. S. 149. It has also been held by this court that the board of education is not liable to the process of garnishment for a salary due a teacher, and that the statute authorizing the garnishment of corporations only applies to private corporations. *Chamberlain v. Watters*, 10 Utah 298; *Van Cott v. Pratt*, 11 Utah 209.

Section 3419, Comp. Laws Utah 1888, giving a party in whose favor judgment is rendered a right to execution; and subdivision 10 of section 3429, exempting certain classes of property from execution against a county, —cannot be extended so as to include the right to levy an execution against the property of the county, state, or municipal organization, in the absence of a statute expressly granting such right in express terms. "The property of such public corporations, and the taxes levied and collected for public purposes, are a constituent part and a necessary ingredient of their public power, and are no more liable to seizure and sale than the whole power itself would be; and before we can assent to the proposition that a political corporation, clothed with so many powers and duties of government, so essential to be sustained by the exercise of their rights and privileges, cannot be secured in their property and means by which their functions can be properly exercised for the benefit of the citizen, we must see some positive act of the legislature authorizing the issuance of the writ." We

cannot admit that any individual possesses such power under our laws as would enable him, in securing a private end, to put an end to the functions of a political organization, and thus disorganize and destroy the government. It is true that a county can sue and be sued, and the rights of a creditor are preserved under section 199, p. 307, 1 Comp. Laws Utah 1888, which provides as follows: "A claimant dissatisfied with the rejection of his claim or demand, or with the amount allowed him on his account, may sue the county therefor, at any time within six months after the final action of the court, but not afterwards; and if, in such action, judgment is recovered for more than the court allowed, on presentation of a certified copy of the judgment, the court must allow and pay the same, together with the costs adjudged; but if no more is recovered than the court allowed, the court must pay the claim, but no more than was originally allowed." A judgment, when obtained against a county, under this act, has the effect of an audited claim against the county. It is conclusive evidence that the county owes the money for which the judgment is obtained. The county court has, after judgment, no discretion to exercise as to the justice and legality of the demand. Nevertheless, it appears to be contemplated by the statute that, after judgment is obtained, it shall be presented to the county court, and placed among the audited demands against the county; and then it is made the duty of the county to allow and pay the claim, together with the costs adjudged. The payment of costs is contingent upon the amount recovered. It was evidently intended by the statute that, when a judgment was obtained, it should have the force and effect of an audited demand, and that the claim was no longer open to contest. The county court, after judgment, and after the

fling of a certified copy thereof with it, has no longer any discretion in the premises. The claim then stands upon the same footing as all other claims and demands against the county, and is therefore subject to all the conditions and limitations applicable to other audited claims, and payment may be enforced in the same manner, and not otherwise. No execution can issue upon a judgment against the county. When the judgment is rendered, and a certified copy thereof is filed with the county court, it then becomes the duty of the county court to apply such funds in the treasury of the county as are not otherwise appropriated to its payment; or if there are no funds, and the county court possesses the necessary power to levy a tax for that purpose, and if it fails or refuses to apply the funds, or to exercise the power, the plaintiff can then resort to his writ of *mandamus*.

A similar question, under a similar statute, has been before the courts of California and other states, where the same conclusion is reached. *Alden v. Alameda Co.*, 43 Cal. 270; *Emeric v. Gilman*, 10 Cal. 404; *Sharp v. Contra Costa Co.*, 34 Cal. 285; *Gilman v. Contra Costa Co.*, 8 Cal. 52; *City of Chicago v. Hasley*, 25 Ill. 485 (595); *Leonard v. City of Brooklyn*, 71 N. Y. 498; High, Extr. Rem. § 232; *Taylor v. County Court*, 2 Utah 405; Dill. Mun. Corp. § 100; *Klein v. New Orleans*, 99 U. S. 149; Sedg. St. Const. 337; *People v. Herkimer*, 4 Cow. 345.

Upon the grounds stated, the judgment of the court below is set aside and vacated, with costs, and a new trial ordered.

ZANE, C. J., and BARTCH, J., concur.

14 334  
119 485

SOPHIA V. BENSON, RESPONDENT, *v.* NICHOLAS  
ANDERSON AND NEPHI P. ANDERSON, AP-  
PELLANTS.

DECREE—WHEN OPENED—CHANGE OF VENUE.

1. A final decree upon the hearing of a cause on its merits cannot be amended or set aside on a motion made after the term has ended, and after the time has expired within which a motion for a new trial as fixed by the statute has passed. After that, such a decree can only be opened upon a bill of review, or upon an original complaint for fraud. But this rule does not apply to avoid decrees or clerical errors.
2. A decree entered after a trial on the merits of the case cannot be opened, set aside, or changed upon a motion, entered after the term, and after the time fixed by the statute for the entry of such motion. An order made upon such a motion is void, and this rule also applies to that part of the decree relating to costs.
3. A refusal of the court to change the venue, upon a motion to set aside a void order, made after final decree in a case, is not reversible error.

(No. 748. Decided Dec. 11, 1896.)

Appeal from the Second district court, Weber county.  
Hon. H. H. Rolapp, *Judge*.

Action by Sophia V. Benson against Nicholas Anderson and Nephi P. Anderson. Judgment for plaintiff, and defendants appeal from an order denying a motion for change of venue and vacating an order. *Affirmed*.

*R. H. Jones*, for appellants.

*Maloney & Perkins*, for respondent.

ZANE, C. J.:

This is an appeal from an order of the district court of Weber county, denying a motion of defendant Nephi P. Anderson to transfer the cause to the district court of Boxelder county, and vacating an order of the district court of the late territory of Utah sitting in the first-named county. It appears from the record that the district court of the territory, on December 15, 1894, heard the cause, and entered a final decree determining the rights of the parties to the land in litigation, and taxing the costs of the case against the defendants; that Nephi P. Anderson, on the 8th day of July, 1895, entered a motion to strike out of the decree that part taxing the costs, and adjudging them against the defendants; and that on the 9th day of December, 1895, another judge sitting in the same court granted the motion. It further appears from the record that the plaintiff, on the 21st day of January, 1896, filed a motion to vacate the last-mentioned order, and that another judge, sitting in the district court of the state in the same county, granted the last-mentioned motion. This is the order appealed from.

The term of the court at which the final decree adjudging the costs against the defendants was made had expired months before the motion to strike out was made. In fact, another term intervened. It was not a void decree,—merely a decree in form,—nor was it a decree *pro confesso*, or by default. Therefore the defendant should have entered his motion during the term at which the decree was made, or, if he desired a rehearing or new trial, he should have given notice and filed his motion for a new trial within such time as the statute allowed. That time having passed, the decree could be opened only by bill of review, or by an original complaint for fraud. “But neither a final judgment nor a final decree,



pronounced upon a hearing on the merits, can be set aside after the term, upon motion, for any error into which the court may have fallen. The law does not permit any judicial tribunal to exercise any revisory power over its own adjudications after they have, in contemplation of the law, passed out of the breast of the judge." 1 Freem. Judgm. § 101. The same rule applies to the imposition of costs embodied in a final decree. "The discretion of the chancellor in the imposition of costs is exercised and exhausted when a decree for the payment of costs is embodied in a final decree settling the equities of the case and defining and declaring the rights of the parties. In the execution of the decree, and as to matters subsequently arising, a further consideration of the cause may be, and is usually, necessary in the court of chancery; but upon such consideration, the term of the court at which the decree was passed and entered having expired, it is not within the competency of the court, upon mere motion, to vary or impugn in any material respect the original decree. Clerical errors or omissions may be corrected, but the sentence of the court, that which has been deliberately ordered and adjudged, cannot be varied. And that is as true in reference to the decree for costs as to any other part of the decree, though as to their imposition the court had originally a discretion. The discretion has been exercised, and cannot be recalled without rendering it uncertain when there will be a final sentence disposing of them." Beach, Mod. Eq. Prac. § 1029. We are of the opinion that the order striking out that part of the final decree adjudging the costs against the defendants was without authority of law, and therefore void.

The defendant Nephi P. Anderson insists that the order appealed from is void; that, under the state constitution,

the district court of Weber county was not authorized to make it; that the case should have been transferred to the district court of Boxelder county. Before statehood all causes of action arising in the latter county were tried in Weber county. It is conceded that the cause was properly brought in the district court of Weber county, and prosecuted therein during the existence of the territory, but it is claimed that the district court of the state sitting in that county had no jurisdiction to make the order. The first district embraced Weber, Boxelder, and other counties before statehood, and the place of holding court in the district for many years was in Weber county, and the records of the district court, under the territory, remained in the office of the clerk of that court, after the inauguration of the state government, except such as were transferred under section 7 of article 24 of the state constitution, to the district courts of the respective counties in which the causes of action arose. So much of that section as it is necessary to consider, with respect to this case, is as follows: "All actions, cases, proceedings, and matters pending in the supreme court and district courts of the territory of Utah at the time the state shall be admitted into the Union, and all files, records, and indictments relating thereto, except as otherwise provided herein, shall be appropriately transferred to the supreme and district courts of the state, respectively; and thereafter all such actions, matters, and cases shall be proceeded with in the proper state courts." This provision contemplated the transfer of cases, proceedings, and matters pending,—not cases closed. Such record remained in the counties in which they had been made up. The final decree, and the order striking out a portion of it, were rendered by the territorial court, and, under the

state, the record thereof remained in the office of the clerk of the district court in Weber county. The order complained of declared an order void found on the records in the office of the clerk of the district court of Weber county.

Defendant also urges that the order appealed from was erroneous because notice that it would be made was not given until after the expiration of the term at which the order to be rescinded was made. Some orders may be made after the end of the term at which a final decree was made upon a hearing, and without a motion for a rehearing or new trial within the time specified in the statute, among which are void judgments, decrees, and orders; and orders making the record speak the truth, correcting clerical errors, and some others of like character, may be so made. Freem. Judgm. § 98; 2 Beach, Mod. Eq. Prac. § 851; *City of Olney v. Harvey*, 50 Ill. 453.

The order appealed from is affirmed, with costs.

BARTCH, J., and STREET, District Judge, concur.

DANIEL DWYER, PLAINTIFF, v. SALT LAKE CITY  
COPPER MANUFACTURING COMPANY ET AL.,  
DEFENDANTS.

APPEAL—FINDINGS IN CHANCERY—SECONDARY EVIDENCE—ME-  
CHANIC'S LIEN—WAIVER.

1. "Where a case is tried in a court sitting as a court of chancery, and the evidence is conflicting, the findings of fact will be conclusive in the appellate court, unless they are so manifestly against the weight of evidence as to demonstrate some oversight or mistake. So, likewise, where the case is tried before a referee, and his findings are confirmed by the court below.
2. "Where a written instrument is traced into the hands of a party, not within the state, secondary evidence is admissible to prove the contents of the instrument, and this without further showing that the original was lost or destroyed. In such case no notice to produce is necessary, and a copy of the instrument is competent evidence."
3. Where a mechanic stipulates with the vendee of premises that he will look to some other person for services performed thereon, or that all such claims have been paid, he thereby waives his lien on such premises. A mechanic's lien is a privilege conferred by statute, and ordinarily may be waived by express agreement of the party in whose favor it exists.

(No. 694. Decided Nov. 10, 1896.)

Appeal from the Third district court, Territory of Utah.  
Hon. S. A. Merritt, *Judge*.

Action by Daniel Dwyer and others against the Salt Lake City Copper Manufacturing Company and others. Judgment for plaintiffs. Defendant Otto Stallman, appeals. *Affirmed*.

14	339
21	43

14	339
24	459

14	339
25	107

14	339
26	499

14	339
31	505

14	339
35	300

*Loofbourow & Kahn and Dickson, Ellis & Ellis*, for appellant.

*Frank Pierce*, for respondents.

BARTCH, J.:

It appears that the Salt Lake City Copper Manufacturing Company was the reputed owner and in the possession of certain land, and that it erected thereon a smelting and copper refining and manufacturing plant. The plaintiffs brought this action to enforce a mechanic's lien against the property, claiming a certain sum of money due them from the company. Abraham Hanauer, trustee, and Otto Stallman, were made parties defendant. Stallman filed an answer and a cross complaint, wherein he alleged that there was due him from the company, for wages as an employé, the sum of \$3,775, and claimed a mechanic's lien therefor on the same property, and sought to enforce it as against the plaintiffs and all other defendants in the action. The company failed to answer, and its default was entered, but the defendant Hanauer answered the cross complaint, denying, for want of information and belief, all the material allegations, and, further answering, alleged that on September 24, 1894, the company executed and delivered to him, as trustee, a trust deed on its property, described in the cross complaint, and other property, to secure the payment of certain promissory notes of the company, aggregating the sum of \$227,200, and claimed that such trust deed was the first lien on the property. Hanauer further alleged that on May 1, 1894, Stallman and the company entered into a written agreement wherein Stallman agreed that all services performed by him on the property prior to April 1, 1894, were performed for one S. M. Green, and that the company was not liable to him for the services performed

prior to that date. The cause was tried before a referee; and, in accordance with the findings of fact and conclusions of law reported by him, the court entered judgment in favor of Stallman, and against the company, for the sum of \$964.65, and ordered so much of the premises to be sold as might be necessary to satisfy the judgment. This judgment excluded the sum of \$2,700 of the claim of Stallman, that sum having accrued for services prior to April 1, 1894, and the referee having found that such services were rendered to S. M. Green. This appeal is taken from various orders and decrees, one of which is an order overruling the appellant's motion to modify the findings and report of the referee, and another an order denying his motion for a new trial.

The referee, among other things, found that the services performed by Stallman on the premises, prior to April 1, 1894, were for Green, and not for the company, and that he was not entitled to judgment against the company, nor to a lien, for the wages earned previous to that date. The appellant insists that the evidence is insufficient to justify or support this finding, and that he was employed by the company, and was entitled to judgment against it, and to a lien for the whole amount of his unpaid wages. Upon an examination of the record, it must be conceded that there is evidence tending to show that the appellant was an employé of the company when his claim accrued, and that it was the owner of the premises in question during the time of his employment, but upon such examination it must likewise be conceded that there is evidence in the record which tends to show that prior to April 1, 1894, Green was the owner of the premises, and about May, 1894, sold the same to the company, and that up to April 1, 1894, the appellant was an employé of Green. Without referring to the evidence in detail, it is clear that there is a substantial conflict

therein on the question whether the premises were owned, and the appellant was employed by the company, or by Green, prior to April 1, 1894; and, such being the case, this court will not disturb the findings of fact in question. The rule is well settled in this state that where a case is tried in a court sitting as a court of chancery, and the evidence is conflicting, the findings of fact will be conclusive in the appellate court, unless they are so manifestly against the weight of the evidence as to demonstrate some oversight or mistake. So, likewise, where the case is tried before a referee, and his findings are confirmed by the court below. *Hannaman v. Karrick*, 9 Utah 236; *Short v. Pierce*, 11 Utah 29.

At the trial the respondent Hanauer offered in evidence a copy of the contract of May 1, 1894, made between Stallman and the company, wherein he, among other things, agreed "that all work and services by him performed with respect to the erection of said works have been paid for by the said S. M. Green, and that the party of the second part is not liable to the party of the first part in any sum whatsoever, except for salary since the 1st day of April, 1894." To the introduction of this evidence the appellant interposed an objection, on the ground that it was incompetent and immaterial, which was overruled, and it is insisted that the action of the court in overruling the objection was erroneous. It was shown that C. P. Mason had been appointed receiver of the company, and was the legal custodian of its books and paper, and that he made search for the original instrument, but could not find it. The witness Dey testified that he saw the contract in the hands of one Saks; that the last time he saw it Saks took it with him; that he tried to secure it for Hanauer's attorneys, but, after sending two telegrams, failed to do so. It also appears from the testimony that Saks was in Europe, and that the original instru-

ment could not be secured. We think the foundation for the introduction of secondary evidence of the contents of the original instrument was sufficiently laid, and that the copy was competent. Where a written instrument is traced into the hands of a party, not within the state, secondary evidence is admissible to prove the contents of such instrument, and this without further showing that the original was lost or destroyed, because where the party into whose possession the instrument is traced, or in whose possession it was last seen, is beyond the jurisdiction of the court, it is neither within the power of the court to compel the attendance of such person, nor the production of the instrument. Nor, in such case, is notice to produce necessary. *Burton v. Driggs*, 20 Wall. 125; *Gordon v. Searing*, 8 Cal. 50; *Manning v. Maroney*, 87 Ala. 563; *Zellerbach v. Allenberg*, 99 Cal. 57; *Knickerbocker v. Wilcox*, 83 Mich. 200.

Nor was the objection good on the ground of immateriality, because the evidence tended to establish the fact that the \$2,700 which accrued to Stallman previous to April 1, 1894, had been paid, and that he had waived his lien by express agreement with the company.

The appellant also insists that if Green owned the premises, prior to the 1st day of May, 1894, and on that day conveyed the same to the company, the grantee took them subject to the lien for his services performed on the property to that date. Doubtless, where land is sold during the time of the construction of a building on which liens have attached, such sale does not affect the rights of the employés; but this cannot avail the appellant in this case, because he agreed with the vendee that all work which had been performed by him upon the premises previous to April 1, 1894, had been paid for by the vendor, and thereby discharged the lien, if any had attached. Whether or not a rescission of the contract of May 1,



1894, which contained this agreement on the part of the appellant, was afterwards made, is immaterial, because, if the contract was rescinded, it was not done until after the rights of Hanauer had accrued; and it does not appear that he was a party to the rescission. Where a mechanic stipulates with the vendee of premises that he will look to some other person for the payment of his claims for services performed thereon, or that all such claims have been paid, he thereby waives his lien on such premises. A mechanic's lien is a privilege conferred by statute, and ordinarily may be waived by express agreement of the party in whose favor it exists. 15 Am. & Eng. Enc. Law, p. 114; Phil. Mech. Liens, § 272; *Brown v. Williams*, 120 Pa. St. 24; *Bailey v. Adams*, 14 Wend. 201.

We do not deem a discussion of the remaining questions presented important, because there appears to be no reversible error in the record. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

MORRIS L. RITCHIE v. MORGAN RICHARDS ET AL.

STATUTES—ENACTMENT—LEGISLATIVE JOURNALS—EVIDENCE—JUDICIAL NOTICE—SCOPE OF TITLE—CONSTRUCTION—DISTRICT JUDGE—TERM OF OFFICE—ELECTIONS—CANDIDATES—SECRECY OF BALLOT—CONSTITUTIONAL LAW—JURISDICTION OF COURTS.

14	345
14	380
15	75
14	345
d16	103
14	345
22	437
14	345
26	307

1. The title of an act, expressed as follows: "An act relating to and making sundry provisions concerning elections," limits its subject to provisions concerning elections, and is sufficiently definite and certain, under section 23, art. 6, of the constitution of the state of Utah.
2. When the language of the title is, in terms limited to provisions concerning elections, provisions concerning appointments to office cannot be included in the law; but, if included, those concerning elections may stand, while those relating to appointments must fall, unless they are so dependent on each other that the former cannot be executed without the latter.
3. So much of section 5 of the act approved April 5, 1896 (Sess. Laws, p. 369, c. 125), as relates to elections, is valid; but the provisions of said section which relate to filling vacancies in certain offices by appointment are invalid, because in conflict with section 23 of article 6 of the constitution. Likewise, section 42 of the same act is void because in conflict with section 23 of article 6 of the constitution.
4. The first term of district judges commenced in January, 1896, and extends until January, 1901, and the plaintiff was appointed in June of the first-named year to fill a vacancy in the office. *Held*, that his term expired upon the qualification of his successor, elected in November, 1896, under a law providing therefor, passed in pursuance of section 10 of article 7 of the constitution, which declares that, if the office of district judge becomes vacant, it shall be the duty of the governor to fill the same, and the appointee shall hold until his successor shall be duly elected and qualified as may be provided by law.

5. A law providing that electors may vote for all the candidates of a party by making a cross opposite a party emblem, and requiring those who do not vote for all such candidates to make a cross opposite the name of those voted for, and requiring those who have not been nominated by a party to present a petition to an officer mentioned, signed by a number of electors, in order to have their names printed on the ticket, *held* to be valid.
6. The limitations and restrictions contained in article 6, §§ 14, 22, 24, and in section 8, art. 7, of the constitution of this state, respecting the enactment of laws, are mandatory and binding upon the legislature. The mandatory provisions of the constitution are conclusive upon all departments of government. Per BARTCH, J. MINER, J., concurring.
7. The courts have power to declare any act of the government, in any of the departments, which violates the constitution, to be utterly void; and, in exercising this function in regard to an act of the legislature, they do not trench upon the domain of the legislative department. Per BARTCH, J. MINER, J., concurring.
8. When the validity of a statute is questioned in a court of law the enrolled act of the legislature, duly signed, approved, and deposited with the proper custodian, is *prima facie*, but not conclusive, evidence of its constitutional enactment, and of what the law is. Per BARTCH, J. MINER, J., concurring.
9. Courts take judicial notice of legislative journals required to be kept by the constitution. Such journals possess the character of public records, and the entries therein contained constitute evidence which courts may consider in determining the question of the constitutional enactment of a statute. Per BARTCH, J. MINER, J., concurring.
10. Where it affirmatively appears upon the legislative journals, or either of them, that in passing an act the legislature disregarded a mandatory provision of the constitution, the court is justified in holding the act unconstitutional and void; but, where journals are merely silent as to the subject-matter under investigation, the court will presume that the legislature acted in accordance with its delegated power, and will hold the act valid, unless an omission of some matter which the constitution expressly requires to be entered thereon be

shown by such journals, or either of them. Per BARTCH, J. MINER, J., concurring. ZANE, C. J., did not concur in holding that a law duly signed by the presiding officers of the respective houses, approved and signed by the governor, and filed in the office of the secretary of state, is not conclusive evidence of its passage, under a constitution which does not require the yeas and nays to be entered on the journals.

11. No legal voter in this state can be compelled to disclose for whom he voted, or to have his ballot so marked that it may be ascertained therefrom how he voted; and any contrivance or method by which the ballot can be identified, and the voter exposed, is unauthorized, and no legislative enactment can give it the force of law. Per BARTCH, J. MINER, J., concurring.
12. So much of section 26 of the act approved March 28, 1896 (*Sees. Laws*, p. 183), entitled "An act in relation to elections," etc., as provides for the identification of the ballot by numbering it, is void; such provision being in conflict with section 8, art. 4, of the constitution, which provides that "all elections shall be by secret ballot," etc. Per BARTCH, J. MINER, J., concurring. ZANE, C. J. dissenting.
13. The constitution secures to the voter impenetrable secrecy. Per BARTCH, J. MINER, J., concurring. ZANE, C. J., *held* legal secrecy sufficient.

(No. 764. Decided Dec. 21, 1896.)

Application by Morris L. Ritchie against Morgan Richards, state auditor, James Chipman, state treasurer, and A. C. Bishop, attorney general, as the board of state canvassers, for a writ of prohibition. *Denied.*

*Arthur Brown, C. F. Loofbourrow, John M. Zane, and C. O. Whittemore*, for petitioner.

The journals must show, in order to support the integrity of any act, that all the necessary constitutional steps were taken in its passage. *Cooley's Const. Lim.*, 506-7; *McCreary on Elections*, 304; *Ryan v. Lynch*, 68 Ill. 162;

*Spengler v. Jacobs*, 14 Ill. 298; *People v. Storm*, 35 Ill. 121; *Will v. Kempfield*, 54 Cal. 112; *Illinois Central R. R. Co. v. People*, 143 Ill. 434; *Railroad Tax Case*, 8 Sawyer 293-5; *Post v. Supervisors*, 105 U. S. 667; *City of Ottawa v. Perkins*, 94 U. S. 261.

On the subject of a marked ballot not being a secret ballot we refer to the following authorities: *Brisbin v. Cleary*, 26 Minn. 106; *People v. Pease*, 27 N. Y. 45; *Williams v. Stein*, 38 Ind. 89; *State v. Hillmantel*, 23 Wis. 422; *Pennington v. Hall*, 62 N. W. 116; *Curran v. Clayton*, 29 Atlantic 932; *Parvin v. Windberg*, 30 N. E. 791; *People v. Com. Onodego County*, 29 N. E. 327; *Nichols Case*, 129 N. Y. 395; *Cooley Const. Lim.*, 6th Ed., 760; *Tebbe v. Smith*, 108 Cal. 110; *Major v. Barker*, 35 S. W. 543; *McCreary on Elections*, 304; *State v. Wray*, 109 Mo.

*W. H. Dickson, H. P. Henderson, J. W. Judd, and R. B. Shepard*, for respondents.

ZANE, C. J.:

The plaintiff is one of the judges of the Third judicial district of the state of Utah, appointed by the governor on June 1st to fill the vacancy caused by the resignation of Judge Le Grand Young, whose term of office extended to the first Monday of January, 1901. In pursuance of an act entitled "An act relating to and making sundry provisions concerning elections," in force April 5, 1896 (Sess. Laws Utah 1896, p. 369), and of an act in relation to elections, defining offenses against the same, and prescribing punishments therefor, in force March 28 (Id. p. 183), a general election was held on the 3d day of November of that year, at which a person was elected to fill the vacancy so held by the plaintiff. The plaintiff asks the court to issue a writ prohibiting the defendants from canvassing the returns of the election of his successor, held

and conducted according to those laws. The plaintiff insists that they are void, and that, therefore, the writ should issue. The journals of the legislature do not expressly show how the votes were taken on the final passage of the bills, but the plaintiff claims that the entries authorize the inference that they were *viva voce*. The fact is entered upon the journals of the respective houses that the presiding officer of each house over which he presided signed both bills.

It is conceded that the bills were properly enrolled, signed by the presiding officer of each house, and approved and signed by the governor, and duly filed in the office of the secretary of state. The defendants insist that these bills, so authenticated, should be deemed complete and unimpeachable; that such authentication furnishes conclusive evidence that the legislature complied with all requisite constitutional provisions in their enactment, and that they were duly enrolled, signed, approved, and deposited in the public archives.

Section 14 of article 6 of the state constitution declares that "each house shall keep a journal of its proceedings, which, except in cases of executive sessions, shall be published, and the yeas and nays on any question, at the request of five members of such house, shall be entered upon the journal." This section requires the yeas and nays upon any question to be entered on the journals upon the request of five members. If such entry had been required for evidence of the passage of the bill, it would not have been made to depend on a request. The purpose of this entry appears to be for future reference and publicity, that the members may act under a consciousness of their responsibility to their constituents and to the public. Section 22 of the same article provides: "The enacting clause of every law shall be: Be it enacted by the legislature of the state of Utah, and no bill or joint

resolution shall be passed, except with the assent of a majority of all the members elected to each house of the legislature, and after it has been read three times. The vote upon the final passage of all bills shall be by yeas and nays; and no law shall be revised or amended by reference to its title only; but the act as revised, or section as amended, shall be re-enacted and published at length." This section prescribes the enacting clause of every law, and requires the assent of a majority of all the members elected to each house thereto after it has been read three times, and a vote by yeas and nays upon its final passage; and forbids the revision of any law by reference to its title, but requires the act revised, or section as amended, to be enacted and published at length. This section does not expressly require the yeas and nays to be entered on the journals, nor does it say by what means the acts specified shall be evidenced. Section 24 of the same article declares: "The presiding officer of each house in the presence of the house over which he presides shall sign all bills and joint resolutions passed by the legislature, after their titles have been publicly read, immediately before signing, and the fact of such signing shall be entered upon the journal." This section requires the title of each bill passed to be publicly read in the presence of each house, and the bill to be then signed, and the fact of signing to be entered on the journals. Section 8 of article 7 of the same instrument so far as necessary to quote it, is: "Every bill passed by the legislature before it becomes a law, shall be presented to the governor; if he approve, he shall sign it, and thereupon it shall become a law." This provision, in effect, says that every bill passed by the legislature becomes a law upon being signed by the governor, but it does not say how the passage of a law shall be evidenced.

Constitutional provisions prescribing modes of enact-

ing laws should be observed. But whether the proof of such observance consists of the enrolled laws deposited in the office of the secretary of state, duly signed by the presiding officers of the respective houses, and with the approval and signature of the governor, or of the entries found on the journals of the respective houses, furnishes a question as to which the courts of last resort in the various states differ. Objections may be urged to either means of proof. Minutes and memoranda may not always be correctly transcribed upon the journals. And the minutes and memoranda are sometimes made amid circumstances calculated to confuse and distract the attention, and to divert it from the business in hand. Bills may sometimes be enrolled, and signed by presiding officers, and approved by the governor, that have never been duly passed. Either source is subject to possible error. Courts and lawyers will differ as to which is the surest and best source of information. However, when statutes are published people shape their actions and conduct with respect to them; they incur obligations, acquire rights, and discharge duties in reliance upon them. If such a law, in any instance, should turn out to be void, because some requirement of the constitution had not been observed in its passage, great injustice would be likely to follow. We must regard the enrolled bill, duly signed, approved, and deposited in the public archives, as a more accessible and convenient source of authentication, and, if referred to, less liable to overturn law, and quite as reliable as the journals of the two houses. The people ought not to be required to ransack such journals to ascertain whether laws have been duly passed, and they cannot be expected to do so. Nor should lawyers, before advising clients, be required to search such journals. Statutory enactments should not depend nor stand upon such a sandy and uncertain foundation, if a better



one can be found. Laws evidenced by the signatures of the presiding officers, and the approval and signature of the governor, and the filing in the public archives, ought not to be overthrown by memoranda on the journals which the constitution does not require to be made.

We are of the opinion that the enrolled bill, duly signed, approved, and deposited in the office of the secretary of state, is quite as reliable, and more accessible and convenient than the entries, or the absence of entries, of legislative action shown by the journals of the two houses, and, if relied upon as unimpeachable, will be less liable to overturn laws upon which the people have relied, and under which they have acquired rights, incurred obligations, and performed duties,—less liable in that way to cause litigation and confusion. The question involves consideration of public policy. In *Lafferty v. Huffman* (a late case decided by the Kentucky court of appeals), 35 S. W. 123, the objection to the law was “that on the final passage in the senate of the bill, as amended in the other house, the vote was not taken by yeas and nays.” After a thorough examination of the question, similar to the one now under consideration, the court said: “From every point of reason, therefore, we are convinced that the enrolled bill, when attested by the presiding officers as the law requires, must be accepted by the courts as the very bill adopted by the legislature, and that its mode of enactment was in conformity to all the constitutional requirements. When so authenticated, it imports absolute verity, and is unimpeached by the journals. When we look to the authorities, we find, as indicated before, a great diversity of opinion. They are too numerous to be reviewed here. We notice, however, that the more recent cases are adopting the English rule, and holding the enrolled bill conclusive. In several of the cases, where the courts felt constrained to follow their

former rulings, holding the journals competent, regret is expressed that a different rule had not prevailed." *Warren v. Board* (Mich.), 40 N. W. 553; *State v. Young*, 32 N. J. Law 29; *Sherman v. Story*, 30 Cal. 253; *State v. Swift*, 10 Nev. 176.

In *Field v. Clark*, 143 U. S. 649, 495, the court, after stating that it was not necessary to decide in that case to what extent the validity of legislative acts may be affected by the failure to enter on the journals matters which the constitution expressly requires to be entered, used the following language: "The signing by the speaker of the house of representatives, and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that passed congress. It is a declaration by the two houses, through their presiding officers, to the president, that a bill thus attested has received, in due form, the sanction of the legislative branch of the government, - and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him. And when a bill thus attested receives his approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable." *Harwood v. Wentworth*, 162 U. S. 547. The constitutions of many of the states expressly require the yeas and nays on the passage of a bill, as well as other matters, to be entered on the journals, while the constitutions of other states do not expressly require such entries. The decisions holding that the court may look beyond the enrolled bill in the public archives, duly signed and approved, in nearly every instance, were made in states whose constitutions expressly require such entries upon the journals, while the decisions, with some exceptions,

holding the law, duly signed and approved, in the public archives, as unimpeachable, were made under constitutions not requiring such entries. There are, however, well-considered cases that hold such laws, so deposited, signed, and approved, as conclusively authenticated, though constitutional provisions expressly require such entries to be made on the journals. It is not necessary for us to go that far in this case, as our constitution does not expressly require such entries to be made, except when demanded by five members; and that entry, we have seen, is mainly for the purpose of publication. English statutes found in the proper custody, duly authenticated, import absolute verity. Such has been the common law of England from early times. The statutes in question having been duly signed, approved and deposited in the office of the secretary of state, we must conclusively presume that all constitutional requisites were complied with in their enactment.

It is also claimed that section 26 of the act in force March 28, 1896, *supra*, is void because it conflicts with section 8 of article 4 of the state constitution, which reads: "All elections shall be by secret ballot. Nothing in this section shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election: Provided, That secrecy in voting be preserved." It is conceded that this section requires a secret ballot, but defendants claim that the statute provides for a secret ballot. The portion of section 26 objected to is as follows: "The judge or clerk shall immediately write the name of such voter upon the poll list, and shall take the ballot of such voter and number it in ink in one corner upon the top thereof, in such manner as not to expose or show how the voter

has voted. The same to be numbered in the order in which it shall be received consecutively, and so as to permit the corner to be turned and pasted down with mucilage, which shall then be done so that the number is not thereafter visible, and such seal shall only be broken in case of a contested election; and the same number shall be recorded by the election judge or clerk on the list of voters beside the name of such voter." Without a violation of law, no one can ascertain from this numbering for whom any citizen has voted, without a contest, and then the court or tribunal before whom the contest is conducted should only allow tickets cast by persons who are not legal voters to be examined, and persons casting such votes cannot insist upon secrecy. If a person succeeds in getting an illegal ticket into the box, it cannot be thrown out without identification; and without the number, or some other character or mark, upon the ticket, it cannot be identified. When the name of a person who has cast an illegal ticket is ascertained, and the number is learned from the poll list, some authorized person must open the box and break the seals until the right number is found; but, until that one is reached, such person has no right to examine the names on any ticket. The number being on the corner, it would not be necessary, nor would it be lawful, for him to examine the names on any lawful ticket. If it should become necessary to count the tickets in the box, it would not be proper to break the seals and examine the numbers for that purpose. It is clear that an examination necessary to a contest cannot disclose for whom any persons, except fraudulent voters, have voted, without a violation of the spirit of the law. We cannot presume that the authors of the constitution intended to prevent election contests,—to prevent any proceeding by which ballots cast by illegal vot-

ers can be thrown out. The method devised by this law preserves legal secrecy. The members of the convention must have known that election contests were permitted in all the states, and that they are deemed necessary wherever the people express their will at the polls. Justice should be permitted to pursue fraud, even into the ballot box. No man should be allowed to hold an office obtained by corrupt or illegal votes. To prevent it, a numbering of ballots is necessary in some cases. It is sanctioned by authority. *Hodges v. Linn*, 100 Ill. 397; *Ledbetter v. Hall*, 62 Mo. 422; *West v. Ross*, 53 Mo. 350. While we are of the opinion that a law might be framed, permitting an election contest, and better adapted to secure a secret ballot, we are disposed to hold the present law valid notwithstanding this objection.

The plaintiff insists further that the subject of the act in force April 5th, *supra*, is not clearly expressed in its title, and that it contains more than one subject, and that it does not conform to section 23 of article 6 of the constitution, which declares that, "except general appropriation bills, and bills for the codification and general revision of laws, no bill shall pass containing more than one subject, which shall be clearly expressed in its title." Undoubtedly this provision requires the subjects of all bills not within the exceptions to be clearly expressed in their titles, and the title limited to one subject. Such limitations were not imposed formerly on legislation, but observation and experience have demonstrated a necessity for their application. It is believed that such restrictions tend to prevent hasty, inconsiderate, improvident, and sometimes corrupt legislation, to the detriment of the common good. The object may be a general one, however, and it may be stated in terms sufficiently comprehensive to embrace every means and end necessary or

convenient for the accomplishment of the general purpose. Their purpose is not fragmentary legislation, however, nor will they permit subjects to be included not connected with the general purpose,—not necessary or convenient as a means to the general end. The title of the act in question is expressed as follows: "An act relating to and making sundry provisions concerning elections." The title, as expressed, indicates provisions relating to or concerning elections. It states a general purpose. It asserts that the entire act relates to elections, and that it contains sundry provisions concerning elections. In that way the title describes the act, and the provisions it contains. The elections which the act concerns, and for which it professes to make provision, are described in general terms, broad enough to include all elections, special and general elections to fill offices for the term, or to fill a vacancy. Thus the subject is expressed, and we think it is expressed with sufficient clearness. *Cooley*, Const. Lim. pp. 170, 172; *People v. Mahaney*, 13 Mich. 481; *Tuttle v. Strout*, 7 Minn. 465 ( Gill. 374).

This brings us to the further question, is the act what the title says it is, and do its provisions concern elections? Two of its sections we will consider with respect to the title: Section 5 is as follows: "If a vacancy occurs in the office of judge of the supreme or district court, secretary of state, state auditor, state treasurer, attorney general or superintendent of public instruction, the governor shall appoint a person to hold the office until the election and qualification of a successor to fill the vacancy, which election shall take place at the next succeeding general election, and the person so elected shall hold the office for the remainder of the unexpired term." In case of a vacancy in either of the offices mentioned, this section makes provision for filling it by election at the next suc-

ceeding general election, and requires the governor to appoint a person to hold it until that time. The provision for the election of a person to fill the vacancy is indicated by the title of the act, but the provision for appointing an incumbent in the meantime is not. The general purpose described in the title includes the election, but does not include the appointment. The provision for the election is valid unless it conflicts with section 10 of article 7 of the constitution. This provision for an election will be considered with respect to said section 10 further on. But the power to appoint a person to hold the office is conferred on the governor by section 10 of the constitution mentioned, and the invalidity of the provision for such appointment, because it is not embraced in the title of the act, is immaterial. It also appears in section 42 of the act under discussion that "all appointive officers in said cities and towns shall hold their respective offices until their successors shall be appointed and qualified." This section does not relate to elections, nor does it concern elections. Therefore the title does not embrace it. The other provisions of the act appear to relate to elections, and are therefore valid, so far as they depend on the title, and they are not affected by those held to be void. If the act is broader than the title, the rule is that the provisions indicated by the title may stand, while those not indicated must fall, unless they are so dependent on each other that they cannot be executed separately. Cooley, Const. Lim. (6th Ed.) p. 177.

As we have seen, this is the first term of office of district judges under the constitution, and that the term extends to the first Monday in January, 1901, and that plaintiff was appointed in May last to succeed Judge Young, who had resigned; and a further question in this case is, can he hold until the end of the term, on the first

Monday of January, 1901, or until the qualification of the person who was elected in pursuance of section 5, *supra*, on the 3d day of November last? If that section governs, his successor was duly elected as provided by law, and upon his qualification the petitioner's right to the office will be at once terminated. Whether it shall govern depends upon the meaning of section 10 of article 7 of the constitution. That section reads as follows: "The governor shall nominate and, by and with the consent of the senate, appoint all state and district officers, whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for. If, during the recess of the senate, a vacancy occur in any state or district office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate, when he shall nominate some person to fill such office. If the office of justice of the supreme court or district court, secretary of state, state auditor, state treasurer, attorney general or superintendent of public instruction be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified as may be by law provided." This section is composed of three distinct clauses or provisions. The first makes it the duty of the governor to nominate, and, with the consent of the senate, appoint, all state and district officers whose offices are established by the constitution, or which may be created by law, and whose appointment or election is not otherwise provided for. If a vacancy occurs in any state or district office during the recess of the senate, the second clause requires the governor to appoint a fit person to discharge the duties of the office until the next meeting of the senate, and



then it requires him to nominate a person to fill the office. If the office of justice of the supreme or district court, secretary of state, state auditor, state treasurer, attorney general, or superintendent of public instruction becomes vacant, the third and last clause of the section makes it the duty of the governor to fill the same by appointment, and provides that such appointee shall hold the office until his successor shall be elected and qualified as provided by law. Doubtless a legislative enactment was contemplated. In the absence of such a law, there would be great force in the claim that such appointee would hold until the general election to fill the office in 1901, and until the qualification of such person, or a successor after that time. But so much of section 5 of the act of April 5th, above quoted, as relates to elections, we hold to be valid, and it must be held to govern.

The plaintiff also insists that ballots prepared and printed according to the act of March 28th, above mentioned, and exclusively used at the November election, do not afford equal facilities to vote to all voters; that a ballot may be cast for party candidates with less difficulty than for those candidates who have no emblem on the ballot to represent them; that a partisan can vote easier than an independent; and that the law does not operate equally and uniformly on all voters. It is true that party organizations may, by the observance of certain requirements, have the names of their candidates and their emblem printed on the ticket, while other candidates are required to obtain the signatures of a specified number of voters to a certificate before their name can be printed on the ballot. And by simply placing a cross opposite a party emblem a vote may be cast for all the candidates of a party, while a vote for any number of candidates of a party less than all can only be given by a

cross opposite the name of each candidate; and if a voter wishes to cast a vote for a candidate whose name is not on it, he is obliged to write the name on the ballot, and place a cross opposite to it. Of course the voter should be allowed to perform this duty with the least difficulty and inconvenience consistent with an honest and fair election. No unnecessary impediments or inconveniences should be thrown in his way. The system tends to encourage the voting of straight tickets, and to discourage independent voting, which some think is an objection. The system has its merits as well as its demerits, and the legislative department of the state government has seen fit, in its wisdom, to enact the law; and we do not feel authorized to overturn the people's will, as expressed through that body, in the law. The court holds that none of the various objections urged by the plaintiff is well founded. We therefore deny the application for the writ.

BARTCH, J.:

I concur in the result that the application for the writ must be denied. But I do not concur in the proposition, which appears to be maintained in the opinion, that when an enrolled act of the legislature is duly signed, approved, and deposited in the office of the secretary of state, this court must conclusively presume that all constitutional requisites were complied with in its enactment. This, it occurs to me, is extending the rule further than is warranted by the decisions of the courts of the United States, or by the welfare of this state, or by the will of the people, as announced in the constitution. Carried to its legitimate effect, this proposition means that when an enrolled act has been properly signed, approved, and deposited with the secretary of state, it is the law of this commonwealth, even though, in its enactment, express limita-

tions of the constitution have been violated, and that when drawn in question the judges who are called upon to determine its validity have no power to go beyond the enrolled act, and look into the journals of the legislature, required to be kept by the constitution, to satisfy the judicial mind of its constitutional passage. This would place the legislature, in the mode of the enactment of laws, beyond the control of the sovereignty itself, and the limitations contained in the constitution respecting the manner of enacting laws would be mere useless verbiage. With all due respect to that co-ordinate branch of the government, I cannot consent to a proposition that would invest it with a power so arbitrary. Because such a rule obtains as to the parliament of Great Britain, under a monarchical form of government, that cannot be regarded as a very potent reason for its application in this state, where the will of the sovereign power has been declared in the organic law. The people, in their sovereign capacity, after great deliberation, adopted a constitution, and established a government consisting of an executive, a legislative, and a judicial department. That constitution is their supreme will, which must be obeyed by every individual, be he of high station or of low. Those composing the several departments are but agents, and in their acts are bound by the organic law; and the limitations and restrictions contained therein are not mere abstract principles, but solemn declarations by the people themselves. They are as conclusive upon such agents as any other portion of the written charter. Limitations are not peculiar to any one branch of the government, but there are those which apply to each department, and they are imposed as a security to the rights of the principal,—the people. The power of the government is vested in the three departments, to be

exercised subject to these limitations. The power to declare what the law shall be is legislative. The power to declare what is the law is judicial. The power to declare what is the law is delegated to the judicial department, and therefore the courts have the unquestioned right to declare any act of the government, in any of the departments, which violates the constitution, to be utterly void. This right or power necessarily includes the power to declare what enactments of the legislature are, and what are not, laws; and in exercising this function the courts do not trench upon the domain of the legislative department, although they pass judgment upon its official acts. When the enrolled act is assailed in a court of law on the ground that it was not constitutionally passed by the legislature, the court must determine whether there was a compliance or noncompliance with the mandatory provisions of the constitution respecting the mode and manner of the passing of the act. For this purpose, I have no doubt that, upon principle, as well as authority, the court may take judicial notice of the legislative journals, and, in a proper case, go behind the enrolled act, even when such act has been properly authenticated and deposited with the secretary of state, and examine such journals, giving their contents such weight as evidence as they may be entitled to receive, considering the manner in which they are kept, and circumstances under which the entries have been made; and if, in such case, it should affirmatively appear upon the journals, or either of them, that in passing the act the legislature had disregarded a mandatory provision of the constitution, the court would be justified in holding the same unconstitutional and void. If, however, the journals are merely silent as to the subject under investigation, then the presumption that the legislature acted according

to its delegated power should prevail, unless an omission of some matter which the constitution expressly requires to be entered therein be shown by such journals, or either of them. It seems that even the English rule admits the journals of parliament to be evidence for such purposes as they are there considered to be provided, but they cannot there be referred to for the purpose of impeaching the enrolled act. I am therefore of the opinion that in this country the enrolled act of the legislature, duly signed, approved, and deposited with the proper custodian, is *prima facie*, but not conclusive, evidence of its constitutional enactment and of what the law is; that the courts may take judicial notice of the legislative journals required to be kept by the constitution; and that such journals possess the character of public records, their value in each case being a question for the courts. In fact, some of counsel for respondents, in their oral arguments, admitted that the courts had the right to take judicial notice of the journals, but claimed that they contained nothing derogatory to the validity of the act, and in this I think they were correct. The journals of parliament to be evidence for such pur-  
evidently intended for the purpose of making a record of the daily proceedings of the legislature. They are, therefore, public records made in *perpetuam memoriam rei* entered therein, and where questions arise as to what is contained therein, or what proceedings were had, the court has the right to inspect the record. Such record is like any other public record, which, in the language of Sir Edward Coke, is "a monument of so high a nature, and importeth in itself such absolute verity, that, if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself." 3 Bl. Comm. 331.

When a similar proposition was before our late territorial supreme court, in *People v. Clayton*, 5 Utah 598, Chief Justice ZANE, then speaking for the court, observed: "Whenever such a question arises, the court, in deciding the issue, should take judicial notice of such facts as it may properly consider. The evidence of public laws should be preserved in public and permanent records,"—and, after reviewing a number of authorities, said: "In the light of authority, we are of the opinion \* \* \* that where the journals of the two houses, showing their action, are kept in pursuance of law, the court may look to such journals to ascertain whether the constitutional requirements have been complied with." Thus, the journals were at that time recognized as evidence by the court. Why should this case be overruled, and a different doctrine prevail now? It certainly cannot be successfully contended that the reasons for recognizing the journals as evidence then were stronger than now, because, in addition to the reasons which then existed, we have now the mandate of the constitution that "each house shall keep a journal of its proceedings." Article 6, § 14. Clearly, the affirmative of the question is supported by the weight of authority in the several states of the Union, as well as by eminent text writers. Judge Cooley, in his treatise on Constitutional Limitations, on page 162, says: "Each house keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to take judicial notice. If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence, and adjudge the statute void." Judge Sutherland, in his work

on Statutory Construction (section 46), states the law as follows: "When an act is found lodged in the office of the secretary of state, with the public acts passed at the same session, signed by the presiding officers, approved and signed by the governor, and it is published by authority as one of the public statutes of the state, or is otherwise authenticated according to law, and in proper custody, the presumption is that it was regularly passed, unless there is evidence of which the courts take judicial notice showing the contrary. The journals are records, and, in all respects touching proceedings under the mandatory provision of the constitution, will be effectual to impeach and avoid the acts recorded as laws, and duly authenticated, if the journals affirmatively show that these provisions have been disregarded. In the absence of such an affirmative showing, and even in cases of doubt, it will be presumed that a quorum was present; that the necessary readings occurred; that amendments made by one branch, though extensive, were germane; that they were concurred in by the other branch,—though the journals may be silent." And in section 42 he says: "The tendency, however, of the law's growth, is to preserve the supremacy of constitutional authority, leaving it to the wisdom of the legislature to mitigate any incidental inconvenience by closer observance of the prescribed procedure, and more diligent attention to the making and preservation of a public record of the essentials. The cases cited in the preceding section hold the constitutional injunctions imperative, and, as the constitutions require the keeping and publication of legislative journals, these are treated as sources of information to be relied on by the courts as well as the public." In section 44 he says: "The journals, by being required by the constitution or laws, are records. At common law the legis-

lative journals were not strictly records. While admissible in evidence for certain purposes, as official memorials or remembrances they were not admissible to show that an act of parliament had not been passed according to its own rules. But when required, as is extensively the case in this country, by a paramount law, for the obvious purpose of showing how the mandatory provisions of that law have been followed in the methods and forms of legislation, they are thus made records in dignity, and are of great importance. The legislative acts regularly authenticated are also records. The acts passed, duly authenticated, and such journals are parallel records, but the latter are superior, when explicit and conflicting with the other; for the acts authenticated speak decisively only when the journals are silent, and not even then as to particulars required to be entered therein." See, also, section 41. So Black, in his late work on Interpretation of Laws (published in 1896) p. 225, after speaking of the right of referring to the journals of the legislature in aid of the interpretation of statutes, says: "It will be observed that this question is an entirely different matter from resorting to the legislative journals to ascertain whether an act was constitutionally passed; that is, passed with the requisite majority, or after the required number of readings, or with a call of the house on its final passage, or otherwise in conformity with the requirements of the constitution. On this point the rule settled by a majority of the courts is that it is competent to go behind the enrolled act, and consult the journals, but that the act will not be declared void for lack of compliance with the constitutional forms, unless their non-observance is shown affirmatively by the journals. If the journals are silent as to these matters, it will be presumed that the legislature complied with all the constitu-



tional requisites. In any event, no evidence can be received to contradict the journals."

In the state of New Hampshire, in 1858, an act was found lodged in the office of the secretary of state, with other public acts passed at the same session. It was signed by the speaker of the house of representatives and the president of the senate, and had upon it the approval of the governor, and had been published, by authority, as one of the public statutes enacted at that session. The validity of the act having been questioned, because in its enactment the legislature had failed to comply with a certain requirement of the constitution, the governor submitted the question of its validity to the supreme court of that state. In their opinion (35 N. H. 579), unanimously holding the act invalid, the court, upon the question whether they could look into the journals, said: "We are of opinion that the journals which the constitution thus requires to be kept by the senate and house of representatives, to be lodged and preserved in the general public depository of the state records, and to be published annually in the same manner as the public laws, were intended to furnish the courts and the public with the means of ascertaining what was actually done in and by each branch of the legislature, not merely for the purpose of enabling the people to judge of the manner in which their public servants have conducted themselves in their office of legislators, but also for the purpose of determining whether the proceedings of the legislature have been in conformity with the provisions of the constitution; that these journals, under our constitution, are not to be regarded as 'mere remembrances of proceedings,' kept by each house for its own use and convenience, which expire when the act is passed, or the business is disposed of, to which they relate. But we think they are to be

treated as authentic records of the proceedings, and that we may resort to them in this case to ascertain whether the two houses in fact concurred in the passage of the before-mentioned act; that, if it appears by the journals that they did not, the *prima facie* evidence derived from an examination of the act itself will be overcome." Mr. Justice Gray, in *Post v. Sup'rs*, 105 U. S. 667, said: "The copies of the journals, certified by the secretary of state, and the printed journals published in obedience to law, are both competent evidence of the proceedings in the legislature." In *Hall v. Steele*, 82 Ala. 562, Mr. Justice Clopton said: "We have uniformly held that, when the constitution does not require the journals to affirmatively show that a particular thing necessary to the validity of the legislative action was done, mere silence will not invalidate; and in such case we will presume that the legislators observed their obligation, and did not pass such bill without sufficient proof that the proper notice had been given. The unconstitutionality of an act enrolled, authenticated by the signatures of the presiding officers, and approved and signed by the governor, must be affirmatively and clearly shown, before the courts are authorized to treat it as void because not having been passed in accordance with the rules of parliamentary law prescribed in the constitution." So, in *Sup'rs v. Heenan*, 2 Minn. 330 (Gil. 281), Mr. Justice Flandrau stated: "The court may inspect the original bills on file with the secretary of state, and have recourse to the journals of the houses of the legislature, to ascertain whether or not the law has received all the constitutional sanctions to its validity."

In *Gardner v. Collector*, 6 Wall. 499 (Mr. Justice Miller delivering the opinion of the court), it was said: "We are

of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when the statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question,—always seeking first for that which, in its nature, is most appropriate,—unless the positive law has enacted a different rule.” In the case of *People v. Mahaney*, 13 Mich. 481, the supreme court of Michigan, speaking through Mr. Justice Cooley, said: “As the court are bound judicially to take notice of what the law is, we have no doubt it is our right, as well as our duty, to take notice, not only of the printed statute books, but also of the journals of the two houses, to enable us to determine whether all the constitutional requisites to the validity of a statute have been complied with. The printed statute is not even *prima facie* valid, when other records, of which the court must equally take notice, show that some constitutional formality is wanting.” The supreme court of Illinois, in *Illinois Cent. R. Co. v. People*, 148 Ill. 434, said: “It is not denied that the amendatory act received the signatures of the speakers of both houses, and the approval of the governor. Such verification is *prima facie* evidence of its validity as a legislative enactment. But it is the settled law of this state that the journals of either branch of the legislature may be resorted to for the purpose of overcoming such *prima facie* evidence. It may be shown from the journals that an act was not passed in the mode prescribed by the constitution.” So the supreme court of Florida, in *State*

v. *Brown*, 20 Fla. 407, says: "If the journals show conclusively that any material portion of a bill, as passed, was omitted in the enrolling, so that it may be considered that the act, as approved, was not passed by the legislature, and does not express the legislative will, the act, as approved, at least to the extent that it is affected by the omission, must be held invalid. This is a rule well settled now by the American courts. The constitution requires the keeping of journals of their proceedings by the respective houses of the legislature, and these journals are received as evidence of such proceedings. When an act is duly approved and published, it is *prima facie* a law; but if the legislative journals show that, instead of being passed, it was defeated, or that it is not the same that was passed, it is not a law." Sedg. St. & Const. Law (2d Ed.) §§ 54, 55; Black, Const. Law, 60, 265; End. Interp. St. § 33; 1 Whart. Ev. §§ 290-295; 1 Greenl. Ev. § 491; 2 Whart. Ev. § 1309. *Henderson v. State*, 94 Ala. 95; *State v. Wright*, 14 Or. 365; *Chicot Co. v. Davies*, 40 Ark. 200; *Spangler v. Jacoby*, 14 Ill. 397; *Currie v. Southern Pac. Co.*, 21 Or. 560; *State v. Robinson*, 20 Neb. 96; *Osburn v. Staley*, 5 W. Va. 85; *In re Roberts*, 5 Colo. 525; *Hart v. McElroy*, 72 Mich. 446; *State v. Hagood*, 13 S. C. 46; *Com'rs v. Higginbotham*, 17 Kan. 62; *Koehler v. Hill*, 60 Iowa 542; *Wise v. Bigger*, 79 Va. 269; *Paving Co. v. Hilton*, 69 Cal. 479; *People v. Dunn*, 80 Cal. 211; *Glidevell v. Martin*, 51 Ark. 559; *State v. Robertson*, 41 Kan. 390; *State v. Van Duyn*, 24 Neb. 586; *State v. Kieseewetter*, 45 Ohio St. 254; *Berry v. Railroad Co.*, 41 Md. 446; *State v. Algood*, 87 Tenn. 163; *State v. Platt*, 2 S. C. 150; *Brown v. Nash*, 1 Wyo. 85; *People v. Campbell*, 3 Gilm. 466; *State v. McBride*, 4 Mo. 302; *State v. Mead*, 71 Mo. 266; *Southwark Bank v. Com.*, 26 Pa. St. 446; *City of Watertown v. Cady*, 20 Wis. 501; *State v. Babbitts*, 46 Ohio St. 173; *People v. Clayton*, 5 Utah 598; *Meracle v. Down*, 64 Wis. 323; *Territory v. O'Connor*,

5 Dak. 397; *Hughes v. Felton*, 11 Colo. 489; *San Mateo Co. v. Southern Pac. R. Co.*, 8 Sawy. 238; *State v. Deal*, 24 Fla. 293; *People v. Burch*, 84 Mich. 408; *Burritt v. Com'rs*, 120 Ill. 222, *Nelson v. Haywood Co.*, 91 Tenn. 596.

The above constitutes but a small portion of the cases which support the views herein contended for. They are sufficient, however, to show that over 20 states have held that the journals of the houses of the legislature may be looked to in deciding the constitutionality of an enrolled act. 23 Am. & Eng. Enc. Law, 208. Seven states appear to have no decisions on the subject. Connecticut, Indiana, Kentucky, Louisiana, Maine, Nevada, and Mississippi have decided that the enrolled act is conclusive, and in several other states the decisions do not appear to be uniform. *Field v. Clark*, 143 U. S. 649, 661, and note. It will be noticed, from an examination of the cases which hold the affirmative of this proposition, that the decisions, in the main, are not based on any peculiar constitutional provision, but on principle, and the ground that the constitution requires the journals to be kept.

It is quite clear that under the American rule, adopted by a large majority of the states of the Union, the legislative journals may be consulted to determine whether the enrolled act was constitutionally passed; and this has also the support of the text writers. That to hold a statute void may work a hardship upon people is quite true, but that fact has no more force when the law is held void because of the violation of a mandatory provision of the constitution than when it is held void for any other reason. It is the solemn duty of courts to declare what the law is, regardless of consequences. In this case, looking to the journals, there appear to be no affirmative statements recorded which conflict with the validity of the enrolled act; and the mere silence of the journals as to the mandatory provision of the constitution here in

question will not justify the holding of the act void, because the presumption in such case that the legislature proceeded properly is conclusive.

I am also unable to agree with the Chief Justice in his views as to a secret ballot. The constitutional provision on this question (article 4, § 8) is as follows: "All elections shall be by secret ballot. Nothing in this section shall be construed to prevent the use of any machine or mechanical contrivance for the purpose of receiving and registering the votes cast at any election: provided, that secrecy in voting be preserved." This is an express provision for a secret ballot, and clearly the word "secret" should, in the interpretation of this section, receive its plain and ordinary meaning, because it does not appear from the context that any other meaning was intended by the framers of the constitution. In fact, the words "secret ballot" appear to be emphasized; for, while the use of a machine or mechanical contrivance is permitted for a certain purpose, it is only permitted "provided, that secrecy in voting be preserved." Used as an adjective, Webster defines the word "secret" as "hidden; concealed." As a noun, "something studiously concealed; a thing kept from general knowledge; what is not revealed, or not to be revealed." Doubtless this latter is the sense in which the words "secret ballot" were used in the constitution. This view is in harmony with public thought and expression respecting the ballot systems at the time of and before the holding of the constitutional convention, and the courts have the right to take notice of the history of the times, for the purpose of ascertaining the intent of the framers of the constitution. It is well understood that the questions of open and secret ballots created much discussion in the several states, as well as in Utah territory, on account of the improper influence,

whether supposed or real, which could be brought to bear upon the humble citizens by their employers, or those to whom they felt under obligations, or which might result from wealth and station. The secret ballot is a question of public policy, and the framers of the constitution doubtless intended to make the veil of secrecy impenetrable, so that the voter could make promises to whom he pleased, and vote as he pleased, without fear of afterwards having the secrecy of his ballot violated. The object to secure an independent ballot would be very imperfectly accomplished if the secrecy was limited to the moment of casting the ballot. It is apprehended that it is not so much the fear of the voter of being exposed then, as the fear of afterwards having his ballot identified and becoming exposed, whether clandestinely or otherwise, that deprives him of independence. Beyond all reasonable controversy, the object aimed at by this provision of the constitution was to secure the independence of the voter. How, then, can this object be attained, if the voter be compelled to cast a ballot which can be identified? To my mind, the conclusion is inevitable that any contrivance or method by which the ballot can be identified and the voter exposed is unauthorized, and no legislative enactment can give it the force of law, under our constitution, be the same for the purpose of contest in a court of justice, or for any other purpose. In arriving at this conclusion, I am not unmindful of the grave duty of the sovereign power to protect individual rights by suppressing election frauds. Such frauds shock the conscience of every true American citizen. But is it not possible to perpetrate the gravest kind of such frauds by the intimidation of the independent voter? Remove the safeguards, and will it not be possible to commit frauds at elections which will strike at the very foundation of gov-

ernment itself? Then why annul a wise provision of the constitution by judicial construction, and render it possible to perpetrate the very offenses which all good citizens condemn? From the time of placing a number on the ballot, as provided by the section of the act in question, which renders it susceptible of identification, its secret character is gone, whether the court pronounces it a legal secret ballot or not. The fact is that such a ballot is not secret, within the meaning and intent of the constitution. Whether the method provided by the legislature is the best or only method which can be of avail in an election contest does not concern this court. It might be suggested, however, that election contests occupied the attention of courts before such a ballot was invented, and considerations of convenience in election contests can have no influence with the court in determining the question under consideration. A legal voter, even in a contest, cannot be compelled to disclose his ballot. Much less should he be compelled to vote one from which it may be ascertained by others, or even a court, how he voted. And this upon consideration of public policy that the secrecy and purity of the ballot may be preserved.

In *Cooley, Const. Lim.* (5th Ed.) 762, the author says: "The system of ballot voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases, and with what party he pleases, and that no one is to have the right, or be in position, to question his independent action, either then or at any subsequent time. The courts have held that a voter, even in case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others, who may accidentally, or by trick or artifice, have acquired knowledge on the subject, should not be allowed to testify to such knowledge, or to give any information



in the courts upon the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it. His ballot is absolutely privileged, and to allow evidence of its contents, when he has not waived the privilege, is to encourage trickery and fraud, and would, in effect, establish this remarkable anomaly, that while the law, from motives of public policy, establishes the secret ballot with a view to conceal the elector's action, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated, and the voter's action disclosed to the public." So in *McCrary, Elect.* § 453, it is said: "The secret ballot is justly regarded as an important and valuable safeguard for the protection of the voter, and particularly the humble citizen, against the influence which wealth and station may be supposed to exercise. And it is for this reason that the privacy is held not to be limited to the moment of depositing the ballot, but is sacredly guarded by the law for all time, unless the voter himself shall voluntarily divulge it." In *Paine, Elect.* § 453, the author states the law as follows: "A constitutional provision that all elections shall be held by ballot guarantees the secrecy of the ballot, and is violated by a statute requiring the tickets to be numbered to correspond with the voters' numbers on the poll list." In the case of *People v. Cicott*, 16 Mich. 283, Mr. Justice Campbell said: "The reason why the ballot is made obligatory by our constitution is to secure every one the right of preventing any one else from knowing how he voted, and there is no propriety in any rule which renders such a safeguard valueless." And again he says: "It would be better to do away at once with the whole ballot than to have legal tribunals give any aid or countenance to indirect violations of its security." So the

supreme court of Minnesota, in *Brisbin v. Cleary*, 26 Minn. 107, speaking through Mr. Justice Berry, said: "The statutory provision with regard to the numbering of tickets, above quoted, clearly interferes with and violates the voter's constitutional privilege of secrecy. The voter cannot be required to submit to its application the ticket offered by him, and if, upon refusing to so submit, he is debarred from voting, he may maintain his action for damages against the persons debarring him." The constitution of Indiana (article 2, § 13) containing a provision that "all elections shall be by ballot," a statute was enacted which provided as follows: "It shall be the duty of the inspector of any election held in this state, on receiving the ballot of a voter, to have the same numbered with figures on the outside or back thereof, to correspond with the number placed opposite the name of such voter on the poll list kept by the clerks of said election." 3 Rev. St. Ind. 1870, p. 235. The supreme court of that state, in *Williams v. Stein*, 38 Ind. 89, held that the ballot secured by the constitution was a secret ballot. Mr. Justice Pettit, delivering the opinion of the court, said: "My convictions are clear that our constitution was intended to and does secure the absolute secrecy of a ballot, and that the act in question, which directs the numbering of tickets to correspond with the numbers opposite the names of the electors on the poll lists, is in palpable conflict, not only with the spirit, but with the substance, of the constitutional provision. This act was intended to and does clearly identify every man's ticket, and renders it easy to ascertain exactly how any particular person voted. That secrecy which is esteemed by all authority to be essential to the free exercise of suffrage is as much violated by this law as if it had declared that the election should be *viva voce*." Mr. Chief Justice Denio,

in *People v. Pease*, 27 N. Y. 45, 81, used the following language: "I have already alluded to the policy of the law providing for a secret ballot. The right to vote in this manner has usually been considered an important and valuable safeguard of the independence of the humble citizen against the influence which wealth and station might be supposed to exercise. This object would be accomplished but very imperfectly if the privacy supposed to be secured was limited to the moment of depositing the ballot. The spirit of the system requires that the elector should be secured then, and at all times thereafter, against reproach or animadversion, or any other prejudice, on account of having voted according to his own unbiased judgment, and that security is made to consist in shutting up within the privacy of his own mind all knowledge of the manner in which he has bestowed his suffrage." *Cooley*, Const. Lim. (5th Ed.) p. 760; *McCrary*, Elect. § 454; *Williams v. Stein*, 38 Ind. 89; *Pennington v. Hare*, (Minn.) 62 N. W. 116; *Attorney General v. McQuade*, 94 Mich. 439; *Parvin v. Wimberg*, (Ind. Sup.) 30 N. E. 791; *State v. Anderson*, (Fla.) 8 South. 1.

In states where the constitution expressly provides for numbering the ballots, the courts doubtless hold such numbering lawful, and the provision mandatory. This is so in Texas, where the constitution, in article 6, § 4, provides: "In all elections by the people, the vote shall be by ballot, and the legislature shall provide for the numbering of tickets," etc. *State v. Connor*, 86 Tex. 133. As will be seen, in that state the numbering of ballots is expressly authorized by the organic law, whereas our constitution not only has no such provision, but expressly commands a secret ballot. The case of *Hodge v. Linn*, 100 Ill. 397, cited in the opinion of the Chief Justice, ought not to be regarded as a controlling authority in

the case at bar, because the constitution of that state does not expressly provide that the ballot shall be secret. See Const. Ill. 1870, art. 7, § 2. The same may be said of the Missouri cases cited in the opinion. See Const. Mo. 1865, art. 2, § 1.

I am of opinion that so much of section 26 of the act approved March 28, 1896 (Sess. Laws, p. 183), as provides for the identification of the ballot, is in violation of the constitution and void; and, in arriving at this conclusion, I am not unmindful of the salutary rule that in the interpretation of statutes all doubts should be solved in favor of the constitutionality of their enactment. The rule is well established, and founded in the highest wisdom. Because, however, a small portion of an act is invalid, it does not necessarily follow that the whole act is void. All that portion of the act which is not repugnant to the constitution is valid. While the numbering of the ballots was improper, still that circumstance should not have the force to avoid the act and overturn the election. The electors were not responsible. Their ballots were honestly cast, and there has not been sufficient reason shown why they should not have been so counted. The writ ought to be denied.

MINER, J.:

I concur in the opinion of Justice BARTCH, and in the holding that the journal of proceedings to be kept by the two houses composing the legislature, under section 14, art. 6, of the constitution, may be examined and inquired into for the purpose of determining any conflict between them and the enrolled acts. In cases of conflict the journal entries should govern and control the presumption arising from enrollment. I also concur in holding that part of section 26, c. 69, p. 183, Laws 1896, with refer-

ence to numbering the ballots, as being in violation of section 8 of article 4 of the constitution, which requires all elections to be by secret ballot. I also concur in the opinion of Chief Justice ZANE, with the exception of the matters above referred to.

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STANTON *v.* HARDY, SHERIFF.

Application of Charles E. Stanton against Harvey Hardy, Sheriff, for a writ of *habeas corpus*. *Denied*.

*Arthur Brown, C. F. Loofbourov, John M. Zane and C. O. Whittemore, for plaintiff.*

*W. H. Dickson, H. P. Henderson, J. W. Judd and R. B. Shepard, for defendant.*

ZANE, C. J.:

This is a *habeas corpus* proceeding instituted in this court for the purpose of obtaining the release of the plaintiff from imprisonment by the defendant, in pursuance of a writ in his hands as sheriff. All the material points relied upon by the plaintiff for his discharge were decided in the case of *Ritchie v. Richards*, 14 Utah 345, as will appear from an examination of the opinion. The application for the writ is denied, and the plaintiff is remanded to the custody of the sheriff until discharged according to law. BARTCH and MINER, JJ., concur in the result.

J. R. HODSON, RESPONDENT, v. UNION PACIFIC  
RAILWAY COMPANY, APPELLANT.

APPEALS—TERRITORIAL AND STATE DISTRICT COURTS.

Appeals lie from the district courts of the late territory of Utah, when the decisions of such courts are rendered in cases appealed from the justices' courts, even when such appeals are perfected after statehood. In such cases the laws of the territory regulating appeals control, and not the following clause of article 8 of section 9 of the constitution: "Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the district courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the district courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute." The district court referred to in this section is the district court of the state, and not that of the territory.

(No. 681. Decided Sept. 19, 1896.)

Appeal from the Fourth district court, Territory of Utah. Hon. W. H. King, *Judge*.

Action by J. R. Hodson against the Union Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Motion to dismiss overruled.

*Williams, Van Cott & Sutherland*, for appellant.

*Evans & Rogers*, for respondent.

ZANE, C. J.:

The respondent has submitted a motion to dismiss this appeal on the ground that it was forbidden by the con-

stitution of the state. It was perfected after statehood, and was taken from the judgment of the district court rendered under the late territorial government in a case that had been appealed from a judgment of a justice of the peace. The territorial law authorized such appeal. The first clause of section 2 of article 24 of the constitution is as follows: "That all laws of the territory of Utah now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitation, or are otherwise altered or repealed by the legislature." And section 9 of article 8 of the constitution is as follows: "From all final judgments of the district courts there shall be a right of appeal to the supreme court. The appeal shall be upon the record made in the court below, and under such regulations as may be provided by law. In equity cases the appeal may be on questions of both law and fact; in cases at law, the appeal shall be upon questions of law alone. Appeals shall also lie from the final orders and decrees of the court in the administration of decedent estate and in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the district courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the district courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute." The district court referred to in this section is the district court of the state, not the district court under any other government, territorial or otherwise. The district court of the state is not a continuation of the district court of the territory; it is instituted by a different government, and its jurisdiction differs in many respects from the territorial court. The third clause of the section above re-

ferred to provides that "appeals shall also be from the final orders and decrees of the court [the same court] in the administration of decedent estates, and in cases of guardianship, as shall be provided by law." The administration of estates and cases of guardianship under the laws of the territory were in the probate court; under the state government they are administered in the district court. We are of the opinion that the provision relied upon expressed in the last clause of the section, "the decision of the district courts on such appeals shall be final," refers to the district courts of the state. We hold that the territorial law providing for appeals from such judgments under the territorial government is not repugnant to the constitution of the state, and that this appeal was properly taken. The motion to dismiss is overruled.

BARTCH, J., and RITCHIE, District Judge, concur.

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JAMES ALFRED WRIGHT, RESPONDENT, v. SOUTHERN PACIFIC COMPANY, APPELLANT.

PERSONAL INJURY—NONSUIT—CONTRIBUTORY NEGLIGENCE—EVIDENCE—FELLOW SERVANT—EXCESSIVE DAMAGES.

1. The plaintiff received the injury complained of while in the employ of defendant, and while acting in the capacity of switchman in defendant's yards. The engine used in moving the cars was operated without a fireman, the engineer performing the duties of fireman himself. This fact was known to the plaintiff, who continued to work without making any complaint to defendant or to any of its agents. The engine

14	383
15	187
15	424
14	383
19	44
14	383
20	216
20	222
14	383
21	302
14	383
24	522
14	383
25	432
14	383
29	280
29	281
14	383
32	206



was defective and required more attention because thereof. Defendant had rules which required switchmen to give signals to the engineer, and to see that the signals were observed and obeyed before going between the cars, and to abstain from going between them while in motion, for the purpose of coupling or uncoupling them. But these rules were constantly violated, not only by the plaintiff but also by the yardmaster, as well as the other switchmen. On the occasion of the accident, the plaintiff gave the engineer the signal to stop, which was obeyed, and then went between the cars to pull the pin; but, being unable to do so, he stepped out, and gave the "slow back up" signal, and, without waiting to see if the signal was obeyed, went between the cars to uncouple them while in motion. The engineer, by a quick movement, bumped the forward cars against the back one. The plaintiff's foot was caught under the brakebeam. He then gave the signal to stop, which not being observed, he was dragged a distance of two or three car lengths until he fell when several trucks passed over and crushed his leg below the knee, causing the injury complained of. When the last signal was given, the engineer was in the act of replenishing the fire, and therefore failed to observe and obey it. Plaintiff's leg was amputated above the knee, and he has been unable to wear an artificial leg. Evidence was introduced tending to show that the accident would not have occurred had there been a fireman on the engine at the time of the accident. *Held*, that the non-suit was properly denied; that plaintiff's knowledge of the fact that defendant operated its engine without a fireman was not of itself sufficient to preclude a recovery; that such a result would not follow unless the want of a fireman caused the operation of the engine to be so obviously dangerous that a man of ordinary care and reasonable prudence would refuse to act as switchman. The plaintiff had the right to rely, at least to some extent, upon the judgment of the defendant's agents, who deemed it safe for the engineer to perform the work of a fireman.

2. An employé, as switchman, assumes the perils and risks ordinarily incident to such employment, including the hazards which observation would bring to his knowledge; but he does not assume the perils occasioned through the negligence of his employer, nor is he bound to anticipate and comprehend all the perils to which he might possibly be exposed because of a

want of a sufficient number of employés to perform the service in safety.

3. The employer has a right to adopt rules for the conduct of business and the safety of the employés; but, in order that such rules may avail the employer in a suit for damages for injuries resulting from a breach thereof, they must not only have been known to the employé, but also their observance must not have been waived by the employer.
4. Where a certain rule of the employer, though established for the safety of the employé, has been habitually disobeyed since its inception, or for a long period of time, in the presence or to the knowledge of the employer, without an attempt to enforce it, or has been disregarded in such manner and for such length of time as to raise the presumption that it was done with his knowledge and approval, the rule will be regarded as abrogated or waived.
5. The question whether, under all the circumstances surrounding the accident, the employé was guilty of negligence which was the proximate cause of the injury, was one of fact for the jury, and not one of law for the court.
6. Whether the employé, at the precise time of the accident, was exercising such care as a reasonable and prudent man, having due regard for his own safety, would have exercised under similar circumstances, or whether he was guilty of contributory negligence in violating a rule of the employer, were questions of fact for the jury to determine.
7. Evidence of a customary disregard of the rule of a railroad company by its employés, with the knowledge and approval of the agents of the company, is competent as tending to show that the rule was abrogated or waived.
8. Where the negligence of the employer and that of a fellow servant combine to produce an injury to a servant, the employer will be liable in damages to the injured servant.
9. Where it is clear, almost beyond reasonable controversy, that the instructions of the court to the jury respecting the question of damages have been disregarded, the supreme court may order a new trial. The same influences which caused the jury to disregard the instructions of the court may have misled them in passing upon other questions in the case.

(No. 691. Decided Sept. 23, 1896.)

Appeal from the Fourth district court, Territory of Utah. Hon. H. W. Smith, *Judge*.

Action by James A. Wright against the Southern Pacific Company for injuries received while plaintiff was in the employ of defendant as a brakeman. From a judgment for the plaintiff, defendant appeals.

*Marshall & Rayle*, for appellant.

"Knowledge of the condition of things on the part of the servant, and his continuance in the service after such knowledge, exempt the master from all liability to the servant for an injury growing out of the condition of things." *Naylor v. Chicago, etc., R. R. Co.*, 53 Wis. 661; *Birmingham, etc., R. Co. v. Allen*, 99 Ala. 359; *I. C. R. R. Co. v. Swisher*, 53 Ill. App. 418; *Simmons v. Chicago, etc., R. R.*, 110 Ill. 341, 347-8; *Stafford v. C., B. & Q. R. R. Co.*, 114 Ill. 244, 247; *Hughes v. Winona, etc., R. Co.*, 27 Minn. 137, 139, 140; *Mundle v. Mfg. Co.*, 86 Me. 400, 406-409; *C., B. & Q. R. Co. v. Merker*, 36 Ill. App. 196, 213; *I. C. R. R. v. Morrissey*, 45 Ill. App. 128, 137; *Ragon v. Toledo, etc., R. R. Co.*, 97 Mich. 265; *LaPiene v. Ry. Co.*, 99 Mich. 212; *Carey v. Sellers*, 41 La. Ann. 500; *Sweeney v. B. & J. Co.*, 101 N. Y. 520; *Kuare v. T. S. & I. Co.*, 139 N. Y. 369, 377; *Cohn v. McNulta*, 147 U. S. 238; *Bunt v. Gold Mining Co.*, 138 U. S. 483; *Dillon v. U. P. R. R.*, 3 Dillon 319; *Kielley v. Belcher S. M. Co.*, 3 Sawyer 500; *Gibson v. Erie Railway Co.*, 63 N. Y. 449; *DeForest v. Jewett*, 88 N. Y. 264; *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 520; *Williams v. Del. L. & W. Rd. Co.*, 116 N. Y. 628; *Powers v. N. Y. L. E. & W. R. R. Co.*, 98 N. Y. 274; *Anthony v. Leeret*, 105 N. Y. 591; *Shaw v. Sheldon*, 103 N. Y. 667; *Hickey v. Taaffe*, 105 N. Y. 26; *Findell v. Del. L. & W. Rd. Co.*, 129 N. Y. 669; *McGlynn v. Bradie*, 31 Cal. 38, 382.

But there are a number of cases specifically holding that a servant assumes the patent risk arising from an insufficient number of employes to assist in connection with his employment, when he consents to engage and continue in the employment with full knowledge of the limited number of assistants in use, or of a duplication of work imposed upon one employé by the master or of the absence of one or more assistants believed to be needed for the work. *Long v. Coronado R. R. Co.*, 96 Cal. 273; *Skippe v. Eastern Ry. Co.*, 9 Ex. 223; cited 31 Cal. 382; *Atchison T. & S. R. Co. v. Schroeder*, 47 Kan. 315; *Southern Kans. Ry. Co. v. Drake*, 23 Kan. 1; *Chicago & N. W. Ry. Co. v. Donahue*, 75 Ill. 166; *Mad River & L. E. R. R. Co. v. Barber*, 5 Ohio St. 542; *International, etc., R. R. Co. v. Beasley*, 29 S. W. R. 1121-1122; *Texas & P. R. R. Co. v. Rogers*, 57 Fed. 378; *Richmond & D. R. Co. v. Mitchell*, 92 Ga. 77, 81; *Schnipp v. Central R. R. Co.*, 85 Ga. 595-6.

The following cases illustrate the principle that a railroad employé engaged in coupling or uncoupling cars assumes all obvious risks connected with his employment. *Kohn v. McNulta*, 147 U. S. 241; *Tuttle v. Milwaukee Ry.*, 122 U. S. 189; *Southern Pac. Co. v. Seley*, 152 U. S. 145; *Appel v. Buffalo, etc., R. R.*, 111 N. Y. 550; *Spencer v. N. Y., etc., R. R. Co.*, 67 Hun 196; *Louisville & N. R. R. Co. v. Boland*, 96 Ala. 626; *Dysinger v. Cin., etc., R. Co.*, 93 Mich. 646; *Davis v. B. & O. R. R. Co.*, 152 Pa. St. 304; *Louisville & N. R. R. Co. v. Goves*, 85 Tenn. 465; *Toledo, W. & W. Ry. Co. v. Black*, 88 Ill. 112; *McLaren v. Williston*, 48 Minn. 299; *Scott v. Oregon, R. & N. Co.*, 14 Oregon 211; *Day v. Toledo, etc., Ry. Co.*, 42 Mich. 523; *Smith v. Potter*, 46 Mich. 258; *Northern Cent. Ry. Co. v. Husson*, 101 Pa. St. 1.

The following cases establish and illustrate the rule that any other servant of a railroad company assumes the risk of the negligence of an engineer employed by

the same company in the conduct of its business: *Randall v. Baltimore & O. R. R. Co.*, 109 U. S. 478; *Baltimore & O. R. R. Co. v. Baugh*, 149 U. S. 368; *Northern Pac. R. R. v. Hambly*, 154 U. S. 355; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412; *Clifford v. Old Colony R. R.*, 141 Mass. 564; *Hobbs v. A. & N. R. R. Co.*, 107 N. C. 1; *Gormley v. Ohio & Miss. Ry.*, 72 Ind. 31; *Porter v. Silver Creek, etc., Co.*, 84 Wis. 418; *Houston, etc., Ry. v. Rider*, 62 Tex. 267; *Tex. & P. Ry. Co. v. Harrington*, 62 Tex. 597; *Gulf, etc., R. R. Co. v. Blohn*, 73 Tex. 637; *Blake v. Maine Cent. R. R.*, 70 Me. 60.

In the following cases, it is held that one who is injured in coupling or uncoupling cars while in motion, in violation of the rules of the railroad company, is guilty of contributory negligence, which is fatal to his right to recover for a resulting injury. *Pryor v. L. & N. R. R. Co.*, 90 Ala. 32; *Richmond & Danville R. Co. v. Thomason*, 99 Ala. 471; *Grand v. Railroad Company*, 83 Mich. 564, 570-71; *Schaub v. Hannibal & St. J. Ry. Co.*, 106 Mo. 74, 92; *Sedgwick v. Ill. Cent. Ry. Co.*, 73 Iowa 158, 160; *Id.* 76; *Johnson v. Chesapeake & O. Ry. Co.*, 38 W. Va. 206; *Railway Co. v. Smith*, 89 Tenn. 114; *Railway Co. v. Rice*, 51 Ark. 468, 477; *Lockwood v. Chicago & N. W. Ry. Co.*, 55 Wis. 51; *Sloan v. Georgia Pac. Ry. Co.*, 86 Ga. 15; *Loranger v. Lake Shore & M. S. Ry. Co.*, 62 N. W. 137.

The duty of compliance with rules is not waived by the mere fact that some controlling official, or the immediate superintendent of the work, has knowledge of the failure to comply, and assents thereto. *Atchison, etc., R. R. Co. v. Reesman*, 60 Fed. 370, 378; *Railroad Co. v. Langdon*, 92 Pa. St. 21; *Virginia Midland R. Co. v. Roach*, 83 Va. 375.

The verdict for damages in the sum of \$20,000 was excessive. *Union Pac. R. R. Co. v. Millikin*, 8 Kan. 647; *Peri v. N. Y. Central, etc., R. R. Co.*, 86 Hun 499; *Holden v. Penn. R. R. Co.*, 7 Kulp (Pa.) 52; *Pfeiffer v. Buffalo R.*

*Co.*, 24 N. Y. Supp. 90; *Sobieski v. St. Paul & D. R. Co.*, 41 Minn. 169; *Tex. & Pac. R. Co. v. McAtee*, 61 Tex. 965; *Mo. Pac. R. Co. v. Dayer*, 36 Kan. 58.

*Richards & Macmillan*, for respondent.

BARTCH, J.:

This action was brought to recover damages for personal injuries which the plaintiff claims he received through the negligence of the defendant. The trial of the case resulted in a verdict in the sum of \$20,000, against the defendant. Upon the hearing of the motion for a new trial, the court reduced that sum to \$15,000, and, on plaintiff consenting to the reduction, overruled the motion, and entered judgment accordingly. This appeal was taken from the judgment, and from the order overruling the motion for a new trial.

It appears from the evidence, substantially, that the plaintiff received the injuries complained of on the 11th day of August, 1892, while acting in the capacity of switchman, under the employment of the defendant, in its yards at Carlin, Nev.; that at the time of the accident he was 28 years old, strong, active, and earning \$80 per month; that he had been so employed for about a year, and all the time had worked with the same switch engine which occasioned the accident; that the engine was operated without a fireman, the engineer performing the duties of fireman himself during the entire time of plaintiff's employment, which fact was known to the plaintiff, who continued to work without making any complaint to the defendant or any of its agents because the engine was thus being operated; that the engine was defective and at one time during plaintiff's employment was sent to the shop for repairs, but after its return it was still defective in its cylinder, and its flues were leaking, in

consequence of which the engineer was required to give the fire and steam more attention than would have been necessary if the engine had not been defective, but such condition of the engine, and the fact that it required more attention because thereof, were unknown to the plaintiff; that the plaintiff knew the defendant had rules which required him to give signals to the engineer, and to see that such signals were observed and obeyed, before going between the cars, and to abstain from going between them while in motion for the purpose of coupling or uncoupling them; that these rules were constantly violated by the switchmen in the presence of the officers of the defendant, and were not obeyed, it having been the custom and practice to couple and uncouple the cars while in motion, on account of the grade in the yard, which would tighten the links and pins, and render it necessary to get the slack by moving the cars; that the plaintiff was in the habit of coupling and uncoupling the cars while in motion, and likewise other switchmen and the yardmaster did the same thing; that on the occasion of the accident the plaintiff gave the engineer a signal to stop, which was obeyed, and he went between the cars to pull the pin, but, being unable to do so, he stepped out, and gave the "slow back up" signal, and again went in between the cars to uncouple them, when the engineer, by a quick movement, bumped the forward cars against the back one; that thereby the plaintiff's foot was caught under the brake-beam, and, holding onto the rung of the ladder, he gave the signal to stop, which not being observed, he was dragged a distance of two or three car lengths until he fell, when several trucks passed over and crushed his leg below the knee, causing the injury complained of; and that, when the last signal was given, the engineer was in the act of replenishing the fire, and

therefore did not observe or obey the signal. It further appears from the evidence that the plaintiff's leg was amputated about seven inches above the knee; that he has been unable to wear an artificial leg; and that he has suffered much, physically and mentally. There is also evidence which tends to show that the accident would have been averted if a fireman had been on the engine. The complaint contained two causes of action, and, when the plaintiff rested his case, counsel for the defendant interposed a motion for a nonsuit, which motion was sustained as to the second cause of action, and denied as to the first. The evidence above set forth relates to the first cause of action.

The first question on this appeal is raised on the motion for a nonsuit. Counsel for the appellant contend that there was no question of fact which ought to have been submitted to the jury, and that, therefore, the court erred in refusing to sustain their motion as to the first cause of action. They further insist that it is immaterial whether or not it would have been a reasonable precaution for the defendant to have provided a separate fireman for the engine, because the plaintiff knew that there was no such fireman, and accepted the employment as switchman with full knowledge of the manner in which the business in that yard was conducted, without making any objection to the engineer's performing the duties of a fireman. We do not think the plaintiff's knowledge of the fact that the defendant operated its engine without a fireman was of itself sufficient to preclude a recovery. Such a result would not follow unless the want of a fireman caused the operation of the engine in the yard in question to be so obviously dangerous that a man of ordinary care and reasonable prudence would refuse to act as switchman. The evidence fails to show that there



was any such obvious danger, and it may rightfully be assumed that the agents of the defendant, who had charge of its operations in that yard, deemed it safe for the engineer to perform the work of a fireman, in addition to his duties as engineer; and, under the circumstances of this case, the plaintiff had the right to rely, at least to some degree, upon the judgment of those agents. Under the evidence shown by the record, we would not be warranted to hold that the plaintiff was bound to rely entirely upon his own judgment, and, in opposition to that of the officers of the defendant, determine that it was absolutely unsafe to operate the engine without a fireman, and abandon his employment as switchman. It is true that, when the plaintiff entered into the employment of the defendant as switchman in the yards at Carlin, he assumed the perils and risks ordinarily incident to such employment, including the hazards which observation would bring to his knowledge; but he did not assume the perils occasioned through the negligence of his employer; nor was he bound to anticipate or comprehend all the perils to which he might possibly be exposed, because of the want of a fireman, or that, on the occasion in question, the engineer would, at the moment of danger, replenish the fire of the engine, and fail to observe the signal to stop. Ordinary care and reasonable prudence on the part of the master or employer require that, for the performance of a particular service, a sufficient number of servants be employed to enable it to be performed in safety; and the employer and employé are both bound to exercise such reasonable care as is commensurate with the danger of the service, and that implies such caution, watchfulness, and foresight as careful, prudent persons, engaged in such business, and doing such service, usually exercise. The duty on the part of

the employer of providing a sufficient number of competent and proper persons to perform a particular service in safety, is just as imperative as the providing of reasonably safe places and suitable machinery; and the servant does not assume perils occasioned by the neglect of this duty. In the case of *Railway Co. v. Herbert*, 116 U. S. 642, Mr. Justice Field, delivering the opinion of the court, said: "The servant does not undertake to incur the risks arising from the want of sufficient and skillful co-laborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by courts of the highest character that it can hardly be considered as any longer open to serious question." *Shear. & R. Neg.* § 193; *Hough v. Railway Co.*, 100 U. S. 213; *Hawley v. Railway Co.*, 82 N. Y. 370; *Railroad Co. v. Baugh*, 149 U. S. 368; *Pidcock v. Railroad Co.*, 5 Utah 612; *Harrison v. Railway Co.*, 7 Utah 523; *Chapman v. Southern Pac. Co.*, 12 Utah 30; *Soeder v. Railway Co.*, (Mo. Sup.) 13 S. W. 714; *Paulmier v. Railroad Co.*, 34 N. J. Law 151.

We are of the opinion that whether or not the defendant was negligent in failing to provide a fireman was, under the evidence as shown by the record, a question of fact for the jury to determine, and not one of law for the court, and that the motion for a nonsuit was properly denied as to the first cause of action.

Counsel for the appellant further contend that the plaintiff was guilty of contributory negligence in attempting to uncouple the cars while they were in motion, and that was done in violation of the rules of the railroad company. The general rule is, doubtless, well settled that, when an employé intentionally and knowingly dis-

regards regulations or rules adopted by the employer for the safety of the employé, the employer is not liable for any injuries which result because of the disobedience of such regulations or rules. This rule, however, admits of some qualifications, as where the employer requires service to be performed in such a manner as to render the violation of a rule necessary, or where he has knowingly permitted or approved its habitual violation, without attempting to enforce it. In order, therefore, that rules for the conduct of business and safety of employées may avail an employer in a suit for damages for injuries resulting from a breach thereof, they must not only have been known to the employé, but also their observance must not have been waived by the employer, nor the existing conditions at the time of the injury have rendered their enforcement and obedience impracticable to perform the services required by the employer. In such cases, as a general rule, the question whether, under all the circumstances surrounding the accident, the employer was guilty of negligence, which was the proximate cause of the injury, is one of fact to be submitted to the jury, and it cannot be determined as a matter of law by the court; and where a certain rule of the employer, though established for the safety of the employé, has been habitually disobeyed since its inception, or for a long period of time, in the presence or to the knowledge of the employer, without an attempt to enforce it, or has been disregarded in such manner and for such length of time as to raise a presumption that it was done with his knowledge and approval, the rule will be regarded as abrogated or waived. In *Railroad Co. v. Flynn*, 154 Ill. 448, it was held that the instructions asked by the defendants, that a railroad engineer could not recover for personal injuries resulting from his disregard of a rule that imperfect dis-

play or absence of a certain signal should be regarded as a danger signal, were defective and properly refused, because they failed to "submit to the jury the question whether the violation of the defendants' rule had become so habitual as to raise a presumption that the defendants were aware of and approved it, and also whether, under existing circumstances, it was practicable to observe the rule, and at the same time run the defendants' trains in the time and manner required by them;" there having been sufficient evidence to raise these questions. In *Hayes v. Manufacturing Co.*, 41 Hun 407, it was said: "Ordinarily, disobedience of a rule would be negligence; but if the defendant prosecuted the work in a manner that rendered the violation of the rule necessary or probable, or if it suffered and approved its habitual disregard, the rule was inoperative." And it was held error to dismiss the action on account of the contributory negligence of the plaintiff, and that the question of his negligence should have been submitted to the jury. *Fish v. Railroad Co.*, (Iowa) 65 N. W. 995; *Sprong v. Railroad Co.*, 58 N. Y. 56; *Alexander v. Railroad Co.*, 83 Ky. 589; *Railway Co. v. Springsteen*, 41 Kan. 724; *Barry v. Railway Co.*, 98 Mo. 62.

In the case at bar the evidence shows that in the yards at Carlin it was the practice of switchmen to couple and uncouple cars while in motion, and it appears that they were so coupled and uncoupled in the presence of officers of the defendant, and that the night yardmaster so uncoupled them. Such seems to have been the practice during the entire time of the plaintiff's employment as switchman. There is also evidence which tends to show that there was a grade in the yard which rendered it necessary for the cars to be moved while they were being uncoupled, on account of the links and pins being tightened when they were standing. The defendant had

provided a rule which forbade the coupling and uncoupling of cars while in motion, but there is nothing to indicate that there ever was an effort made to enforce it, although it was constantly being violated in the presence of the agents of the defendant. On the occasion in question the cars were moving about three or four miles per hour. Whether, under the circumstances disclosed by the evidence, the plaintiff, at the precise time of the accident, was exercising such care as a reasonable and prudent man, having due regard for his own safety, would have exercised under similar circumstances, or whether he was guilty of contributory negligence in disobeying the rule referred to, and attempting to uncouple the cars while in motion, were questions of fact for the jury to determine. The plaintiff's disobedience of the rule, under the state of facts shown by the record, did not, as matter of law, preclude his recovery. In *Eastman v. Railway Co.*, 101 Mich. 597, it was said: "Stepping between cars while in motion to uncouple them is not, as a matter of law, negligence, but the question is one for the jury." *Lowe v. Railway Co.*, 89 Iowa 420; *Ashman v. Railroad Co.*, 90 Mich. 567; *Railway Co. v. McMahan*, (Tex. Civ. App.) 26 S. W. 159; *Snow v. Railroad Co.*, 8 Allen 441; *Fay v. Railway Co.*, 30 Minn. 231.

Nor do we think the court erred in admitting evidence to show that it was the custom of the switchmen, in the yard at Carlin, to couple and uncouple cars while in motion. The defendant denied the right of the plaintiff to recover, because of his own negligence in attempting to so uncouple the cars, in disregard of one of its rules. The evidence in question tended to show a waiver of the rule by the railroad company, and was therefore proper and admissible. The law does not prevent parties to a contract from waiving provisions thereof. Such a rule

is reasonable, and, if enforced, will receive the sanction of the courts, as tending to promote the safety of employes. In such event, injuries resulting from a violation thereof, without the permission of the employer, would, ordinarily, be without redress; but it would seem unjust, and not in consonance with a proper administration of the law, to permit an employer to adopt a rule for the safety of the employé, and after tacitly consenting to its constant violation, in case of suit brought by an employé injured in the service while disregarding the rule, refuse to admit evidence tending to show that, in practice, there was no such rule, or that its violation was necessary to properly perform the service, or that it was abrogated or waived by the employer. We are aware that some cases hold that such evidence is not admissible, but the affirmative of this question appears to be sustained by sound reason and the weight of authority. In *Hunn v. Railway Co.*, 78 Mich. 513, Mr. Justice Champlin, delivering the opinion of the court, said: "We think it was competent to show what was usually and habitually done in the running of trains, because, if the company permitted or had so framed the rules as to require the employé to exercise some discretion in the matter of strict obedience, it ought not to be permitted to hold its employes to the very letter of the rule, in order to shield the company from liability for what it had tacitly permitted." So in *Railway Co. v. Nickels*, 1 C. C. A. 625, 50 Fed. 718, it is said: "This uniform and constant acquiescence of the defendant to the violation of this rule, if such a rule was really in existence, was a violation of the contract on the part of the defendant that it did not and would not acquiesce in the violation of any of its rules, and relieved plaintiff from further compliance therewith; and if, on the other hand, the rule was not really in force, if it had been waived or aban-

doned, the utter disregard of the rule, and defendant's acquiescence therein, were competent evidence of the abandonment. In either case the plaintiff had a right to rely on the conduct of the defendant, and to introduce his evidence in this behalf." *Wood, Mast. & Serv.* § 401; *Strong v. Railway Co.*, (Iowa) 62 N. W. 799; *White v. Railway Co.*, 72 Miss. 12; *Francis v. Railway Co.*, 127 Mo. 658; *Hissong v. Railroad Co.*, (Ala.) 8 South. 776; *Bonner v. Bean*, 80 Tex. 152.

The appellant also insists that the engineer and plaintiff were fellow servants, and that, if the injury was caused by the negligence of the engineer, the defendant was not liable. The jury were so instructed, and they were further instructed that no liability attached unless the "defendant alone was negligent," and "its negligence produced the injury." The instructions on this point were quite favorable to the defendant, and, in order to find a verdict for the plaintiff, the jury must have found that the defendant was negligent in not providing a fireman for the engine, and that such negligence was the proximate cause of the injury. In such event, if it were conceded that the engineer and plaintiff were fellow servants, and that the defendant is not liable for the negligence of the engineer, it cannot defeat the action, even if the engineer was also negligent, because where the negligence of an employer and that of a fellow servant combine and produce an injury to a servant, the employer will be liable in damages to the injured servant. While the employé who engages to perform a service assumes the risk of negligence on the part of a fellow servant, which the employer is unable to prevent, he does not assume any risk of negligence on the part of his employer. *Shear. & R. Neg.* § 187; *Railway Co. v. Cummings*, 106 U. S. 700; *Coppins v. Railroad Co.*, 122 N. Y. 557; *Railroad Co. v. Young*, 1 C. C. A. 428.

The only remaining question which we deem it necessary to notice, although there are others raised in the briefs of counsel, is that relating to damages and to the verdict. The appellant contends that the jury were influenced by passion or prejudice, and therefore awarded damages which are grossly excessive. We think there is merit in this contention. It is difficult to see how the jury, under the evidence and in the instructions of the court, as shown by the record, could arrive at the conclusion that \$20,000 was a fair and reasonable compensation for the injury suffered. In its instructions to the jury, the court, after stating the elements which entered into the question of damages, said to them that, if they found the issues for the plaintiff, then, from all the facts and circumstances, they must determine what would be just as matter of damages to him, purely as matter of compensation, and then further instructed them that they could take into consideration neither the wealth nor the poverty of either the plaintiff or the defendant. The rule as to the measure of damages was fairly stated to the jury, and the law will not permit a corporation, any more than an individual, to be mulcted in punitive or vindictive damages, in a case like this. Nor will it permit any other rule to be applied to a corporation than to an individual, and yet it would seem almost impossible to believe that the jury, under all the circumstances of this case, would have returned such a verdict if the defendant had been a private person instead of a corporation. Without attempting to determine how this verdict was arrived at, it is clear—almost beyond reasonable controversy—that the rules of law laid down by the court as to the question of damages, in its instructions, were disregarded; and it is fair to assume that the court below so viewed the action of the jury, because, upon hearing a motion there-



for, it ordered a new trial to be granted, unless the plaintiff would remit from the judgment which had been entered on the verdict the sum of \$5,000; and the plaintiff himself must have entertained a similar view, or, at least, must have thought the verdict grossly excessive, when he remitted that sum. In their disregard of the instructions of the court, the jury committed a grave error, resulting in a verdict which is not warranted by the evidence. They were bound by the law as laid down by the court, whether right or wrong, and had no right to consult their own notions as to what the law ought to be. Therefore, when they departed from the instructions, they stepped beyond the limits of their power, and, in so doing, we must assume that they were influenced by some improper motives, or did it through a misapprehension of the facts and instructions.

Counsel for the respondent maintain that this court cannot disturb the verdict; that it has no power to review questions of fact; and that the amount of damages is a question of fact. They rely on article 8 of section 9 of the constitution of this state, which, in relation to appeals to the supreme court, contains the following provision: "In equity cases the appeal may be on questions of both law and fact. In cases at law the appeal shall be on questions of law alone." We do not think this provision of the constitution is applicable to this case, and therefore expressly refrain from an interpretation thereof. The cause was tried, judgment entered, notice of intention to move for a new trial served, statement on motion for new trial and appeal settled, and motion overruled, by the territorial district court, before the late territory of Utah became a state; and, under the constitution, in order that no inconvenience may arise by reason of a change from a territorial to a state govern-

ment, all actions are continued the same as if no change had taken place; and, likewise, all laws not repugnant to the constitution are continued in force until they expire by their own limitations, or are altered or repealed. Article 24, §§ 1, 2. Therefore the territorial statutes applicable to the case continue in force on appeal, and hence this court may examine the evidence to ascertain whether or not the verdict and judgment are in excess of what, in justice, the plaintiff is entitled to recover, and then reverse, affirm, or modify the judgment, or direct a proper judgment to be entered. Comp. Laws Utah 1888, § 3006. Considering all the evidence and all the circumstances of the case, we conclude that the verdict and judgment are grossly excessive, and, under the facts and circumstances disclosed by the record, we do not regard it proper either to modify or direct what judgment should be entered, and thus substitute our judgment for that of the jury in this case. Where it is clear that in a case of personal tort, where the damages are unliquidated, or there is no legal measure of the same, and no definite amount shown, the jury have entirely misapprehended the facts, and committed substantial error in their application of the law to them, or, against the instructions of the court, have suffered prejudice or passion to mislead them, and thereby perpetrate an injustice by rendering a verdict greatly in excess of just compensation for the injury, a new trial ought to be granted. In the case at bar the jury were called upon to exercise reasonable discretion, obey the instructions of the court, and, upon a candid and fair consideration of all the facts and circumstances proven render a just verdict. That they failed to do this was practically admitted by the court below in requiring a remission of, and by the plaintiff in consenting to remit, a large portion

of the judgment entered on the verdict. The fact that the plaintiff filed a remittitur at the instance of the court did not render the action of the jury unobjectionable, or cure the verdict, under the circumstances shown by the record. The same influences which resulted in such a verdict may have misled the jury in passing upon other questions of fact. The judgment is reversed, and remanded, with directions to grant a new trial.

ZANE, C. J., and MINER, J., concur.

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J. R. HODSON, RESPONDENT, *v.* UNION PACIFIC  
RAILWAY COMPANY, APPELLANT.

RES JUDICATA—DAMAGES—REMISSION.

1. Plaintiff in this action assigned to H. for the purposes of a suit thereon, his claim for damages against the defendant company for the killing of his horse. H. brought suit, and, in his complaint, stated two causes of action, in two separate counts; the first count being for the value of his own horse, which was also killed by the said defendant, and the second count for the value of this plaintiff's horse, by right as assignee. A general verdict was rendered in favor of H. on both causes, and judgment rendered thereon for one entire sum. Upon the hearing of a motion for a new trial, H. remitted a sum equal in amount to that claimed for plaintiff's horse, and the defendant afterwards paid the judgment. The assignment had been made an issue, and was declared valid. There was no appeal or reversal of the judgment. The defendant herein set up that judgment as a bar to this action. *Held*, that the plaintiff must be regarded as in privity with H. in the

former action, and that he is estopped from again litigating the same claim against the same defendant.

2. If, in an action, a court had jurisdiction to render a judgment, and such judgment has never been reversed or modified, it is binding on the parties and their privies, and conclusive of the questions litigated; and, if the court has misapplied the law as to any question, the judgment must nevertheless stand until corrected in some appropriate way.
3. Where a party obtains a judgment for damages, and voluntarily, without specifying any purpose, remits a part thereof, he abandons his claim to the sum so remitted, and may not afterwards bring an action to recover such sum. Such remission has the effect of crediting the defendant with the amount remitted, on the judgment.

(No. 681. Decided Jan. 28, 1897.)

Appeal from the Second district court, Territory of Utah. Hon. W. H. King, *Judge*.

Action by J. R. Hodson against the Union Pacific Railway for damages sustained by the killing of a horse. From a judgment for plaintiff defendant appeals. *Reversed*.

*Williams, Van Cott & Sutherland*, for appellant.

*Evans & Rogers*, for respondent.

No briefs were filed.

BARTCH, J.:

This action was brought to recover damages for the negligent killing of the plaintiff's horse by the defendant. It is averred, in substance, that on December 9, 1890, the plaintiff was the owner of a certain mare, of the value of \$70, which was negligently killed by the defendant near Layton, Davis county, Utah. After denying the allega-

tions of the complaint, it was alleged in the answer that on or about October 15, 1891, in an action pending in the district court, wherein Thomas H. Hodson was plaintiff and this defendant was defendant, a judgment was duly rendered in favor of said Thomas H. Hodson and against the said defendant for the value of the horse sued for herein, together with damages for another horse, with interest from the time of the killing, and for costs of suit; that said Thomas H. Hodson obtained said judgment for the horse sued for herein as assignee of the plaintiff in this action; that by said judgment it was ascertained and adjudged that said Thomas H. Hodson was such assignee of the plaintiff herein; and that afterwards, in 1891, the defendant fully paid and satisfied said judgment. At the trial of this cause the defendant introduced in evidence, without objection, the record of the former trial, from which record it appears that the same subject-matter herein was in controversy therein, and that the assignment by this plaintiff of his interest in the value of the horse sued for herein to the plaintiff in that suit was made an issue both in the pleadings and proof in that suit, and was submitted to the jury, who returned a verdict in favor of the plaintiff therein, and against the defendant, for one entire sum, including damages and interest, of \$281.70, although there were two horses sued for, and there being two separate counts in the complaint,—one for the value of a horse by right of ownership, and the other (being the one in controversy herein) by right of assignee. It further appears from such record that the court entered judgment in favor of the plaintiff therein, in accordance with said verdict, and that, thereafter, upon the hearing of defendant's motion for a new trial, the plaintiff, by his counsel, in open court, remitted from the verdict the sum of \$73.05, which was the amount

of the principal and interest for the second cause of action, being the cause on which this suit is founded, and on which the plaintiff has recovered judgment against the defendant for the sum of \$91.40 and costs. It also appears that the assignment was made by the plaintiff in this case with the intention that an action should be brought for the value of the horse in question. Such are the pleadings and the material evidence on which the appellant relies to release itself from the obligation created by the judgment in this suit.

The only question which is necessary to be considered on this appeal is whether the former judgment on the second cause of action is a bar to this suit, and operates as an estoppel to another judgment for the same cause of action. We think this must be decided in the affirmative. There is no question that the court in the former suit had jurisdiction to render that judgment, and the judgment has never been reversed or modified. It is therefore binding on the parties and their privies, and conclusive of the questions litigated, even though erroneously decided. The question whether the plaintiff in this suit had assigned his interest in the subject-matter on which the second cause of action in that suit was based, to the plaintiff in that suit, was an issue therein, and the court held that he had assigned his interest. This being so, he cannot now be heard to say that he was not a party to that suit, because, having been represented therein by his assignee, the judgment is just as binding on him as if he had been a party of record. Having litigated his claim in the former suit, and obtained judgment, which has neither been reversed nor modified, he is estopped from again litigating the same claim against the same defendant. To hold otherwise would be to permit a person to assign his claim for the purpose of an action thereon

by the assignee, and after final judgment, unreversed, allow him, if he should desire the experiment, to commence another suit against the same defendant on the same cause of action, to be proved by the same testimony. The law does not recognize such experiments. The plaintiff in this case must be regarded as in privity with the plaintiff in the former, because the judgment establishes the fact of the assignment, whether right or wrong, and identity of the causes of action having been established, and the judgment in the former action having been rendered in conformity with a general verdict on the whole cause, the plaintiff in this action is bound by the judgment in the former, in the absence of a reversal or modification thereof. That judgment is conclusive, not only between the same parties, but also their privies, of every question decided; and, if the court misapplied the law as to any question, the judgment must nevertheless stand until corrected in some appropriate way. Freem. Judgm. §§ 249, 272; Herm. Estop. §§ 107, 108, 247; Black, Judgm. § 609; *Ex parte Hays*, 14 Utah 118; *Dowell v. Applegate*, 152 U. S. 327; *Claflin v. Fletcher*, 7 Fed. 851; *Godding v. Colorado Springs Live Stock Co.*, (Colo. App.) 34 Pac. 942; *Elder v. Frevert*, (Nev.) 5 Pac. 69.

The fact that at the hearing of the motion for a new trial in the former action the plaintiff, by his counsel, remitted from the judgment an amount equal to the sum claimed in the second cause of action, is immaterial, and does not militate against the force and effect of the judgment, in the absence of any understanding or agreement between the parties, so far as appears from the record, as to what effect such remission should have. That judgment was an entirety on the whole cause of action, and the remission of a part thereof, without specifying, by agreement or otherwise, for what purpose it was made,

simply had the effect of crediting the defendant with the amount remitted, on the judgment. Where a party obtains a judgment for damages, and voluntarily, without specifying any purpose, remits a part thereof, he abandons his claim to the sum so remitted, and may not afterwards bring an action to recover such sum. This is so as to a person who has in fact assigned a claim for the purposes of an action, as well as to one who is a party of record. If, in the former action, the plaintiff and his assignor did not wish to abide by the judgment as to the second cause of action, they had the right to dispose of such cause, either by withdrawal thereof, or by submission to nonsuit, or in some other proper way, before the judgment was pronounced. Having failed to do so, this plaintiff cannot now be heard to complain. The record shows nothing which entitles him to maintain this suit. The judgment is reversed and remanded, with directions to the court below to dismiss the action.

ZANE, C. J., and HART, J., concur.



CHARLES HECHT, APPELLANT, *v.* JOSEPH METZLER,  
RESPONDENT.

VENDOR AND PURCHASER—FRAUD—DAMAGES—EVIDENCE.

1. Appellant, owning land in Colorado, which had been examined by respondent, entered into a written contract with respondent to exchange the Colorado land, at a price named in the contract, for Ogden land, which respondent represented to be of a certain value, yielding certain fixed rentals, and located high and dry, in a specified locality. Appellant had not examined all the Ogden land, and the price of it was not stated in the contract of sale, but was in the deed. The Ogden property was not as represented, did not yield one-half the rent as represented, and was not worth one-third of the price represented. On the trial of the action brought by appellant to recover damages for fraud and deceit on the part of respondent in procuring the exchange, and where the respondent alleged no fraud on the part of appellant, the respondent, by his attorney, in his opening statement to the jury, under an offer incorporated in the answer, was allowed, under objection, to state to the jury that respondent offered then and there to sell and convey the Colorado property back to appellant for the sum of \$15,000, whereas appellant was claiming damages at \$85,000, and in open court tendered a deed for the sum from respondent's grantee on payment of \$15,000, and offered to give time on stated payments. *Held*, that the court erred in allowing the offer to stand; that this was not a method recognized by law for proving value. The right of damages in such a case is absolute upon the happening of the wrong, and nothing but the act of the injured party could release it. The offer made doubtless operated to the disadvantage of the appellant. *Held*, further, that under the pleadings the value of the Colorado property, concerning which no fraud or deceit is alleged, was not in issue, so far as affecting the question of damages; that the appellant was entitled to the benefit of his bargain, and it was not for the jury to fix a new price on the appellant's

land, when the same had already, without deception, been fixed by the parties.

2. An expression of opinion, estimate, or judgment of the value of property, even if false, does not ordinarily constitute actionable fraud. But a willful misrepresentation by a vendor affirming that the rental from property exchanged was greater than it was, when relied upon by the vendee, is an actionable fraud.
3. So a willful representation by an owner, in the exchange of real estate, that the property exchanged was high and dry, and located in a particular place, which representation was relied upon by the purchaser as true without inspection of the premises, but which was false, and which operated to the purchaser's injury, is an actionable fraud.
4. Where the court instructed the jury that there was no evidence in the case as to what appellant did pay for the land in question, and that he was only entitled to recover what he paid, and further instructed the jury to disregard the testimony of appellant with reference to respondent's representations as to the rentals of certain pieces of land taken in exchange by appellant, which had a tendency to affect the value of the land, whereas the written contract and testimony did show that the price paid by appellant for such property was 8,250 acres of land at an agreed price of \$30 per acre, *held*, that the instruction was erroneous, and that the proper measure of damages in such a case is the difference between the actual value of the land purchased by appellant as it would have been if as represented and as it actually was.

(No. 695. Decided March 6, 1897.)

Appeal from the Fourth district court, Territory of Utah. Hon. H. W. Smith, *Judge*.

Action by Charles Hecht against Joseph Metzler for tort committed in the fraudulent misrepresentation of land and its rental value. From a judgment for defendant, plaintiff appeals. *Reversed*.

*Maginnis & Weber*, and *J. N. Kimball* for appellant.

*E. M. Allison and Evans & Rogers, for respondent.*

No briefs were filed.

MINER, J.:

On August 1, 1893, at Denver, Colo., appellant and respondent exchanged real estate by written contract, which was afterwards executed by interchange of deeds of conveyance. By the terms of the written contract, appellant agreed to exchange 3,250 acres of land in Colorado, at a stipulated price of \$30 per acre, and some personal property, for four pieces of property belonging to respondent in Ogden, Utah. The price of the Ogden property was not fixed in the contract, but was fixed in the deeds of conveyance. Plaintiff alleged in his complaint that the price of each piece of Ogden property was fixed and represented by the defendant at the following stated sums in the negotiations which culminated in the written contract: One piece of the Ogden property consisted of residence property on the corner of Washington avenue and Twenty-first street, valued at \$10,000, and represented by the defendant to be renting at \$240 per year. The second piece was business property on the corner of Twenty-third street and Washington avenue, of the value of \$60,000, and was represented by the defendant to be producing a rental of \$4,000 a year. The third piece consisted of a vacant lot on Twenty-Eighth street and Washington avenue valued at \$16,000. The fourth piece consisted of a number of lots and a piece of unplatted ground in South Ogden, known as "Central Park Annex to the City of Ogden," valued at \$33,000, and represented by the defendant to be sufficient to cut into 100 full-sized building lots, and situated southeast of the Pingree Avenue school-house, and that they were high, dry, and smooth, were full lots, accessible to the streets,

and with buildings built up around them. Plaintiff alleges that the representations as to the value, location, and rental of said lots were false, and known to be false by the defendant, and that the lots conveyed were not the lots sold, and that he relied upon the representations as being true, and made the exchange in reliance thereon. Plaintiff also claims that the defendant went over and examined the Colorado property, but that he (the plaintiff) never examined the Ogden property with a view of purchasing it; that he saw the first three descriptions named, but was not shown the lots in question, and had no information as to the rental of the improved property, except what he obtained from the defendant, as aforesaid, before the contract was made. The answer denied the allegations in the complaint; alleged that the Colorado property was not worth to exceed \$15,000, and offered to reconvey and deliver the whole thereof for \$15,000; that the plaintiff had inspected the lots and property in question before the exchange was consummated; and denied that the value inserted in the Ogden deed was fictitious.

This action was brought to recover damages for fraud and deceit, and the measure of damages relied upon was the difference between the actual value of the several pieces of Ogden property as it was and what it would have been worth had the representations been true. After the plaintiff's attorney had made his opening statement to the jury, and before the trial proceeded, the attorney for the defendant made the following opening statement to the jury: "That we right here and now offer to deed that ranch to Mr. Hecht for the sum of \$15,000, when he is asking for a judgment of \$85,000, and keeps the Ogden real estate. We right here say now to the gentleman that claims he has been damaged in the sum of

\$85,000, that here and now we do in our testimony, and have in our answer, said, 'Take the ranch at \$15,000.' Maginnis: I object to his making a statement of that kind to the jury. (Objection overruled. Exception.) Allison: \* \* \* I desire to say in that connection, before the verdict, for fear that it may be replied that the gentleman has not got \$15,000 in ready cash, we will give him time on the account for which he can have that ranch. He can pay part in cash and the rest on time. Maginnis: I suppose we have our exception to that statement? Allison: We have the deeds in our possession, and we tender them a deed of that ranch conveying this property to him in the presence of the jury, where he is asking \$85,000 damages. We offer to convey that ranch and all the personal property to him for \$15,000, and in addition to that— Maginnis: We want this taken down, and note an exception. Court: I don't know what the gentleman means by offering a deed here. Allison: We propose to keep our offer good during the whole trial. Court: I think they have a right to do that. Maginnis: Counsel has no right in the opening statement to get matter before the jury that the court could not admit at another stage of the case. I would like the remarks noted, and take an exception to them. I would like to see those deeds, please. Allison: The name of Mr. Hecht is not in them, but we will have it inserted. Maginnis: This is a deed from Stowe. Allison: We said in our answer that we would convey it or cause it to be conveyed. He has not got a deed back from the gentleman who owns it, and will produce an abstract showing that the gentleman now owns the ranch. Maginnis: He has got a deed signed by Theodore Stowe. I simply call attention to the fact to show how loose this matter is. We don't know who Stowe is, whether his warranty is any good, who he is, or

what he is, whether he is responsible, or whether he is married, or whether his wife joins with him in the deed— Court: It don't make any difference, if you don't accept it. Maginnis: Counsel has no right to make the statement. Counsel is dealing improperly in this case. Court: Is it claimed that there was any money paid? Maginnis: No, sir; it was an agreed price. Court: Was there anything else than an exchange? Was there a money consideration? Allison: No, sir. Maginnis: There was personal and real property on our side. Court: No notes and no mortgages? Maginnis: None, except assumed. We desire now an exception to allowing counsel to make this statement. Court: I think the statement may stand. (Exception by plaintiff.)” The appellant now contends that the offer to sell to appellant the Colorado property for \$15,000 at the time of the trial, May 10, 1895, and the tender of a deed from respondent's grantee, upon payment of \$15,000, in the presence of the jury, and the remarks and order of the court in permitting the offer to stand against his objection and protest, were error.

The price of the Colorado land was fixed and expressed in the contract of sale at \$30 per acre, besides the personal property. The price of the Ogden property was not fixed in the contract of sale, but the consideration, as alleged, was stated in the deeds. The answer does not allege any deceit or fraudulent representations on the part of the appellant with reference to the Colorado property. The trial took place about 21 months after the contract was made,—at a time when values may have greatly depreciated. With reference to damages, the case must be tried just as it would have been tried the day after the contract was made, if the question had arisen at that time. The deed tendered was signed by Mr. Stowe, with no assurance of title, and when there

was not time to ascertain whether or not the title was perfect. Who Stowe was, and whether he had a wife or not, does not appear. The offer was not to trade back, but to sell to appellant at a given price, below the price stated in the deed and contract. When the objection was made, the court remarked, "It don't make any difference, if you don't accept it," and permitted the offer to stand. By this remark the court emphasized the propriety of the offer, and from it, if the offer was not accepted, the jury might have inferred without proof that the appellant had placed an exorbitant price upon his land, and was seeking to recover unjust damages at their hands. The appellant may not have had a dollar with which to purchase, even if the price asked was one-quarter its actual value. Or he may have been so impoverished by the results of the trade or otherwise that to accept would not only be to lose his case, but the land besides. To refuse to accept the offer might be used as an argument to the jury that his demand was unjust. If the offer was made in good faith, it proved nothing. It was not a method recognized by the law for proving value. Nor was it competent as tending to show that appellant had lost nothing by the exchange. A party should not be permitted to create testimony in this manner. There is some force in the remarks of counsel for the appellant "that courts of justice are not organized to be turned into market places, where suitors, for the purpose of bluff or otherwise, are expected to enter into a wager on real estate, or any other transaction, in order to maintain a remedy which the law gives for frauds practiced upon them." The appellant could not, under any rule of law, be compelled to buy back his property, although offered to him at less than the market value. The right of damages in such a case is absolute upon the happening of the wrong,

and nothing but the act of the injured party could release it. 1 Sedg. Meas. Dam. (8th Ed.) § 53; *Weld v. Reilly*, 48 N. Y. Supr. Ct. 531. The offer was doubtless made as affecting the value of the Colorado property exchanged by the appellant. As before stated, the answer alleges no fraud or deceit on part of the appellant in making this exchange. The value of the Colorado property was stipulated in the contract of sale to be \$30 per acre, and the price was carried into the deed of conveyance as the agreed consideration for appellant's Colorado property. This price was so fixed after the respondent had visited the Colorado farm and examined it. The action was brought to recover damages for fraud and deceit on the part of the respondent. We think the offer was not competent for this purpose.

In *Stanhope v. Swafford*, (Iowa) 45 N. W. 403, the court held that, "in an action for false representations in an exchange of land, allegations in the answer as to the value of the land traded by plaintiff were properly stricken out when its value was fixed by the written contract between the parties, and that an action for false representations inducing plaintiff to enter into the land trade is distinct from an action on the contract of exchange, and may be maintained, although such representations do not appear in the written contract." In *Matlock v. Reppy*, (Ark.) 14 S. W. 546, it is held in a similar case that in an action for false representations as to land, evidence as to the value of the land exchanged by the plaintiff is immaterial when the value was agreed to. In *Drew v. Beall*, 62 Ill. 164, in an action brought for fraud and deceit in the exchange of land, the defendant offered to prove the value of the house and lot he received from the plaintiff in exchange, as affecting the question of damages, which the court refused to allow,



and the supreme court held that the proof was properly rejected, and that the plaintiff was entitled to the benefit of his bargain, and it was not for the jury to make a new contract for the parties, or fix a new price on plaintiff's property. The offer made was improper. The ruling thereon was clearly erroneous, and doubtless operated to the disadvantage and injury of the appellant.

On the trial the appellant introduced testimony tending to establish the allegations in his complaint, and, among other things, evidence tending to prove that respondent fraudulently represented that the Twenty-Third street property was producing \$4,000 rental per year, and was worth \$75,000, when in fact it was renting for about \$90 per month, and was not worth more than \$17,000; that the Twenty-First street property was represented to be of the value of \$16,000, and renting for \$240 per year, whereas the value did not exceed \$5,000, and it was renting for not over \$90 per year; and that the lots in question were not located as represented, did not contain the land as represented, and were partly located in a swamp; that appellant relied upon the representations made as true, and believed them to be true, and made the exchange in reliance thereon; that, had the representations been true, the land in question would have been worth the amount paid for it, but, as it was, the land was not worth over one-third to one-fifth the price paid; that in consideration for this property he gave the respondent the contract and deed of the Colorado land, valued in the contract and deed at \$30 per acre, besides a lot of personal property. At the close of the plaintiff's case, the court, on motion of the defendant, struck out all of the testimony of the plaintiff with reference to the false representations and rental of the Twenty-Third and Twenty-First street properties, and confined the proof

to the Central Park annex, and remarked to the jury that "these lots were the only matter involved in the case," and afterwards instructed the jury that they should wholly disregard the testimony with reference to the Twenty-First and Twenty-Third street properties, as to the false representations made concerning them, and the rentals thereof, and further remarked to the jury: "In other words, he cannot complain of the thing he bought when he does not show what he paid for it; in other words, all he would be entitled to under such circumstances would be to recover what he paid, and, as there is no evidence as to what he did pay, there is no question for you to determine in regard to these two pieces of property." The plaintiff excepted to the ruling and charge of the court, and assigns error thereon. Generally, the mere expression of opinion, estimate, or judgment of the value of property, even if false, does not constitute actionable fraud. As a general rule, actionable fraud or misrepresentation consists in a false statement concerning a fact material to the contract, and which is influential in producing it. Mere statements of value, made by a vendor, during negotiations between the parties, although known to be excessive, do not ordinarily constitute either a warranty or a fraud, unless the peculiar relation of confidence and trust existing between the parties is such that the person making the false representations had reason to believe that the other would rely and act upon them. But a willful misrepresentation by a vendor, affirming that the rental from the property sought to be exchanged was greater than in truth it was, is an actionable fraud, and an action will lie against a vendor for falsely representing that a greater rent is paid for the land than is actually received, for that is

a fact peculiarly within the knowledge of the vendor. *De Frees v. Carr*, 8 Utah 488. In this case the appellant exchanged the Colorado land, which respondent had examined, at a stipulated price per acre for the properties falsely represented to bring certain annual rentals. Had the income been as represented it would have affected the value of the property obtained by the appellant, and was, therefore, a material representation. In *Griffing v. Diller*, (Sup.) 21 N. Y. Supp. 407, the court held that, "although false representations as to value are not alone sufficient to sustain an action for damages suffered in an exchange of lands in reliance on such representations, yet such misrepresentations, in connection with others as to the net revenue derived from the land, are sufficient to support such action, and to entitle plaintiff to recover." In *Wise v. Fuller*, 29 N. J. Eq. 257, it is held that the statement that a greater rent is received than is in truth received, or that the income from the property is greater than it is in fact, being matters peculiarly within the knowledge of the vendor, are fraudulent representations, for which an action will lie. This seems to be the general rule, and as adopted in Utah. *De Frees v. Carr*, 8 Utah 488; *Speed v. Hollingsworth*, 54 Kans. 436; 3 Sedg. Meas. Dam. (8th Ed.) §§ 1027, 1028; 2 Warv. Vend., p. 969, § 10.

The court, in its instruction to the jury, limited the appellant's right of recovery to what he paid, and, notwithstanding the testimony was clear that he gave 2,250 acres of land, valued at \$30 per acre, the court held that there was no evidence as to what he did pay, and that he was only entitled to recover what he paid. We are of the opinion that the measure of damages as laid down by the court was erroneous. Sedgwick, in his excellent

work on Measure of Damages (8th Ed., vol. 3, §§ 1027-1029), lays down the general rule of damages in cases of this character as follows: "In such actions, as in actions for fraud in the sale of chattels, it has usually been held that the measure of damages is the difference in value between the land as it would have been if as represented and as it actually was at the time of the sale." Judge Sutherland says: "In case of sales, where there is a fraudulently false representation of quantity, quality, or title, the measure of damages is the difference in value between that which is actual, and that which is represented to exist." 3 Suth. Dam. (1st Ed.) pp. 589-592. In *Drew v. Beall*, 62 Ill. 165, the court held that: "In case of an exchange of land, wherein the defendant was fraudulently induced to make the exchange for other property, the plaintiff was entitled to have a tract of land as it was represented to be; and, if he did not get it, the measure of damages was the difference between the actual value of the land and the value of the same if it had been such as it was represented to be." The rule is well established that in an action for fraud and deceit in the sale or exchange of real estate the measure of damages is the difference between the actual value of the land as it would have been if as represented and as it actually was. *Stiles v. White*, 11 Metc. (Mass.) 356; *Drew v. Beall*, 62 Ill. 164; *Matlock v. Reppy*, (Ark.) 14 S. W. 546; *Griffing v. Diller*, (Sup.) 21 N. Y. Supp. 407; *Lynch v. Trust Co.*, 18 Fed. 486; *Antle v. Sexton*, (Ill. Sup.) 27 N. E. 691; *Wright v. Roach*, 57 Me. 600; *Herefort v. Cramer*, 7 Colo. 483; 3 Sedg. Meas. Dam. §§ 1027-1029; *Page v. Wells*, 37 Mich. 415; *Vail v. Reynolds*, 118 N. Y. 297; *Stevens v. Allen*, 51 Kas. 144; *Krumm v. Beach*, 96 N. Y. 399.

We are of the opinion that the court erred in striking out plaintiff's testimony with reference to the fraudulent

misrepresentations of the defendant as to the rentals of the Twenty-First and Twenty-Third street properties, and also in its instruction to the jury on the measure of damages, as applied to that property, and in its instructions to the jury that plaintiff would only be entitled to recover what he paid. In the view taken of the case, we do not consider it necessary to review other assignments of error presented by the record. The judgment of the court below is reversed, with costs, and a new trial granted.

ZANE, C. J., and BARTCH, J., concur.

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STATE BANK OF UTAH, RESPONDENT, *v.* BURTON-  
GARDNER COMPANY ET AL., APPELLANTS.

PROMISSORY NOTE—CONDITIONAL GUARANTY—EVIDENCE—NOTICE—  
CONDITIONAL DELIVERY.

1. One or more persons may sign a note as guarantors, and deliver it to the payee, with the agreement that they shall not be bound unless other persons named shall also sign, and, if such other persons do not sign, that those signing shall not be held.
2. On cross-examination an agreement was offered in evidence by the defendants, and excluded because they had not set it up in their answer. Afterwards it was set up in an amended answer, and admitted. *Held*, that its exclusion in the first instance does not constitute reversible error.
3. Where objections to certain questions have been erroneously sustained, and the information called for by the questions has been subsequently given to the jurors, the ruling will not be regarded as reversible error, unless there is a probability that

such erroneous ruling prejudiced the case of the party ruled against.

4. It was not error in the court to instruct the jury that no agreement between the directors with respect to the contract of guaranty, of which plaintiff was not clearly notified, could bind it.
5. It being conceded that the note sued on was signed by the president and secretary of the defendant corporation and the other defendants, and that it had been turned over to plaintiff, it was not error in the court to charge the jury that the law presumes the note was executed and delivered, if in the same charge the jury were told that the plaintiff had the right to waive the guaranty of any director who did not sign the contract; that by accepting the note without the guaranty of some of the directors, the bank did not thereby release those who did sign, unless the jury should find that the plaintiff had actual notice that those signing did so with a condition that all the directors should sign, and, if they did not, none of those signing should be liable.

(No. 731. Decided March 18, 1897.)

Appeal from the Third district court, Salt Lake county.  
Hon. John A. Street, *Judge*.

Action by State Bank of Utah against the Burton-Gardner Company and others on a promissory note. From a judgment for plaintiff, defendant appeals. *Affirmed*.

*Marshall & Royle*, for appellants.

*Barlow Ferguson*, for respondents.

ZANE, C. J.:

This action was instituted on a promissory note bearing date May 4, 1893, given by the defendant the Burton-Gardner Company to the plaintiff for the payment of \$12,000, 90 days after its date. There was a written guar-

anty on it, signed by defendants E. M. Weiler, William S. Burton, W. C. Burton, and O. H. Hardy. The note included the sum of \$10,000, balance due on a matured note of defendant corporation, and \$2,000 advanced by the plaintiff to the company. It appears that the plaintiff, before extending the time for the payment of the \$10,000 due on the old note, and a credit of \$2,000, required security. The cashier of the bank testified that the plaintiff told the officers of the defendant company that satisfactory security was demanded, while the president and vice president of the company testified that the cashier required the guaranty of the directors of the company. In this respect there was a conflict in the evidence. It further appears that the note was executed on the 4th day of March, 1893, by the defendant company, and that the defendants William S. Burton and E. M. Weiler at the same time signed the guaranty on the note, and that they handed it to plaintiff's cashier with the statement that the other directors would also come in and sign the guaranty; that W. C. Burton did so; that on the 6th of the same month the cashier informed William S. Burton that O. H. Hardy, Elias Morris, Henry Dinwoodey, and L. G. Hardy, the other directors, had not signed the guaranty; that Burton then took the note, and obtained the signature of O. H. Hardy, and left word at the offices of the other directors to come to the bank and sign, and took the note back, and delivered it to plaintiff's cashier; that they never did sign it; and two of them—Dinwoodey and Morris—testified that they never agreed to, while Weiler and Burton testified they did. It further appears that on the same day the defendant company was given a credit on the books of the bank for the \$12,000 note, and the old one, on which \$10,000 was due, was surrendered up to the defendant company, and canceled, and those signing made no further effort

to secure the signatures of the other directors, nor did they give any further attention to it until after the note became due. The guarantors alleged as a defense that the delivery of the note to the plaintiff was conditional, and that their guaranty was not to take effect unless the other directors should also sign. Undoubtedly the law is that one or more persons may sign a note or guaranty, and deliver it to the payee with the agreement that they shall not be bound unless other persons named shall sign also; and, if such other persons do not sign, that those signing shall not be held. There are authorities holding that such conditional delivery cannot be made to the payee; that it must be to a third party. But the weight of authority is to the effect that such conditional delivery may be made to the payee. *Burke v. Dulaney*, 153 U. S. 228; *Ware v. Allen*, 128 U. S. 590; *Pawling v. U. S.*, 4 Cranch 219; *Gregg v. Groesbeck*, 11 Utah 310.

This case was submitted to the jury, and they must have found upon the issue of conditional delivery against the defendants. We are not prepared to say that their finding was clearly against the weight of evidence before them.

Numerous errors are assigned upon the ruling of the court sustaining objections to questions propounded to witnesses by defendants' counsel. In their original answer the defendants denied the execution and delivery of the note sued on, but did not allege an agreement that the other directors of the defendant company were to execute the guaranty, and that those directors signing were not to be bound unless the others did sign. Under that answer the court ruled out defendants' cross-examination of witnesses tending to prove such agreement. That ruling was excepted to and assigned as error. But the court



afterwards permitted an amended answer to be filed, alleging the agreement, and evidence offered to prove such agreement was admitted. That being so, we do not think the ruling of the court complained of should be regarded as reversible error. During the examination of witnesses by counsel for defendants other objections to questions and answers were sustained, and exceptions were taken, but the witnesses were afterwards permitted to make the statements called for by the interrogatories to which the objections had been sustained. While the rulings upon such objections were, in some instances, erroneous, the information called for having been given to the jury by the witnesses afterwards, we are not disposed to reverse for such erroneous rulings.

The charge of the court contains the following language, which the defendants excepted to, and assign as error: "In this connection, you are further instructed that no agreement between the directors themselves with respect to the contract of guaranty and indorsement, of which plaintiff was not clearly notified, can in any way bind the plaintiff." The objection is to the word "clearly." It is urged that the use of the term "notified," without the additional force which the term "clearly" gave to it, was sufficient; that notice with less certainty or clearness than the above indicated would have been sufficient. It is urged that the portion of the charge quoted with the word "clearly" required more proof that the plaintiff assented to the alleged agreement than the law required. The note being in the possession of the plaintiff with the guaranty on it, the presumption was that the delivery was absolute; that it was not conditional. Proof of the agreement, and that plaintiff was a party to it, was required to be shown by evidence sufficient to lead the jury to believe, as reasonable men, that

plaintiff's officers or agents knew of the agreement, and assented to it. We are of the opinion that the exception was not well taken.

The defendants also excepted to the following portion of the charge, and assign the giving of it as error: "The court instructs you, first, it is admitted by the evidence that the note sued on was signed by the president and secretary of the defendant the Burton-Gardner Company, duly authorized, and that it was signed by the other defendants, as shown by the note itself, and was turned over to the bank. Under this state of facts the law presumes the note was executed and delivered." This portion of the charge, considered without taking into consideration other parts that explained it, would have been erroneous. But the entire charge must be considered together. The charge also contained the following: "You are further instructed that the plaintiff had the right to waive the condition as to the guaranty of any directors who did not, for any reason, sign the contract and indorse the note; and by accepting the note without the indorsement of certain directors the bank did not thereby release those who did indorse the note and sign the contract of guaranty, unless you find that the plaintiff had actual notice that the defendants who signed the guaranty signed it with the condition precedent to their liability thereon that all the directors should indorse the note and sign the contract of guaranty; and also, in the event of any director not signing, that none of those who signed should be liable." Considering these two paragraphs together, it is not probable that any juror would understand the court intended that it was admitted the note with the guaranty on it was signed and delivered unconditionally. He would understand that it was for the jury to find from the evidence whether the persons who

signed the guaranty and delivered the note did so with an agreement with the plaintiff that, if the other directors did not sign, those signing should not be held; and, if they believed there was such an agreement, the jury should find for such directors signing, unless they believed from the evidence the others did sign the guaranty. While the law applicable to the facts might have been stated with more clearness, we are not disposed to believe that the jury was misled by it. The entire charge, considered together, amounted to a substantial statement of the law applicable to the evidence and the facts. The defendants assign other errors, which we have carefully considered. We find no reversible error in the record. The judgment of the court below is affirmed.

BARTCH and MINER, JJ., concur.

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ANNIE JOHNSTON ET AL., APPELLANTS, v. WILLIAM  
MEAGHR ET AL., RESPONDENTS.

MALICIOUS PROSECUTION—PROBABLE CAUSE—FALSE IMPRISONMENT  
—PLEADING—MISJOINDER OF CAUSES—PROVINCE OF JURY—  
APPEAL—REVIEW—BREACH OF PEACE—TRESPASS—TITLE—RES  
JUDICATA—EVIDENCE.

1. The plaintiffs alleged that defendants maliciously and without probable cause commenced a prosecution against plaintiff Annie Johnston; that they falsely charged her with threatening to assault defendant Meaghr and others with deadly weapons; that a warrant issued, upon which she was arrested; that they unlawfully, maliciously, and without probable cause,

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imprisoned her, without any right whatever. No demurrer was filed. *Held*, after verdict and judgment, that the facts stated should be regarded as a count for malicious prosecution.

2. Plaintiff cannot, in one count, rely upon false imprisonment, and malicious prosecution. The foundation facts on which these causes rest differ. The gist of one is the malicious institution of a suit without probable cause. The gist of the other is the illegal and forcible invasion of an individual right to liberty.
3. The plaintiff cannot, in the same count, rely upon two or more distinct matters, each of which, independently of the other, amounts to a good cause of action.
4. While section 3126, 2 Comp. Laws Utah 1888, declares that "there is in this state but one form of civil action for the enforcement or protection of private rights and the redress and prevention of private wrongs," and while all distinctions as to forms of civil actions are abolished, the distinctions as to causes of action remain.
5. In construing pleadings upon demurrer the maximum is that everything shall be taken most strongly against the party pleading. If two meanings present themselves, the one shall be adopted most unfavorable to the pleader. But the rule applicable after trial is that, if two reasonable meanings present themselves, that shall be taken which supports the complaint or plea, not the other, which would defeat it.
6. If there was a substantial conflict in the evidence as to whether defendants, or either of them, caused the prosecution to be commenced, and as to whether the plaintiff made the threats, and as to whether they, or either of them, had a reasonable fear that the crime threatened would be committed, or if there was room for a difference of opinion among reasonable men as to the existence of those facts, it was error to instruct the jury to find for the defendants.
7. Before finding against any of the defendants, the jury were required to believe from a preponderance of the evidence that they caused the prosecution, and that they did not have reasonable cause to believe that plaintiff made the threats, or that they did not have a reasonable fear

that the crime threatened would be committed. If there was room for difference among reasonable men as to the existence of those facts, the evidence should have been submitted to the jury.

8. Probable cause for a criminal prosecution is equivalent to reasonable cause, and consists of facts in the mind of the prosecutor sufficient to lead a person of ordinary caution to believe that the party to be prosecuted is guilty,—as applied to this case, that the offense was threatened by Annie Johnston as stated, and that there was just reason to fear that the crime threatened would be committed.
9. While the ninth section of article 8 of the state constitution declares, "In cases at law the appeal shall be on questions of law alone," this court will examine the evidence to which the ruling was applied so far as necessary to determine whether such ruling was right or wrong.
10. A person who attempts unlawfully to enter upon land in the lawful possession of another cannot require such person in possession to give a bond to keep the peace, because he resists and threatens to shoot if such unlawful attempt is persisted in. Sections 4796, 4798, 2 Comp. Laws Utah 1888, do not apply to threats upon such conditions. Peace warrants, and bonds to keep the peace, are not designed to protect men in doing unlawful acts against others, or against their property. Their purpose is to secure observance of law, not to encourage its violation.
11. Actual possession is *prima facie* evidence of title in fee simple.
12. Mere occupancy of land, however recent, is sufficient evidence of title against any one who cannot show a better claim, and is sufficient to enable him to maintain an action against a stranger.
13. A person in the lawful possession of land has a legal right to prevent an unlawful entry, by any degree of force necessary, short of taking human life.
14. Judgments of magistrates against defendants in prosecutions to bind persons to keep the peace, and in preliminary examinations, are not conclusive. They simply furnish a *prima facie* presumption of probable cause.

15. The plaintiff offered to prove by a witness that defendant Rowe said "that, when plaintiff opposed his men, he directed defendant Meaghr to commence the prosecution, so that he could construct the ditch through the land, and that he also said that, if plaintiffs would promise to let the ditch be constructed peaceably through the land, he would stop the prosecution." *Held*, that the rulings of the court sustaining an objection of defendants to the offer was erroneous; that it was competent, relevant, and material, as against defendant Rowe.

(No. 726. Decided Feb. 15, 1897.)

Appeal from the Second district court, Box Elder county. Hon. C. H. Hart, *Judge*.

Action by Annie Johnston and another against William Meaghr and others for malicious prosecution and false imprisonment. Judgment for defendants. Plaintiffs appeal. *Reversed*.

On June 25, 1894, the respondent, William H. Rowe, was the receiver of the Bear Lake & River Irrigation & Canal Company, and on that day the respondent Meaghr was his foreman, in charge of a gang of men and teams engaged in constructing a lateral canal, near Point Lookout, in Box Elder county, upon and through some land which the appellants claimed to be the owners and were in the possession of, and the appellants, on said day, by certain acts and threats and the exhibition of an unloaded Winchester rifle, a pistol and a prod-pole, attempted to and did, in fact, compel Meaghr, his men and teams, to cease the construction of the said lateral canal; and the plaintiff, Annie Johnston, upon said occasion beat and prod the horses used in the work with the pole, in the end of which was a sharp steel prod, and both appellants threatened to shoot Meaghr.

After the perpetration of these acts and threats by the appellants, Meaghr reported the same to Mr. Rowe, who instructed him and another of his employes, one Jarvis by name, to lay the facts before the prosecuting attorney of Box Elder county.

As a result plaintiffs were taken before a justice of the peace and required to give bonds, each in the sum of \$200, to keep the peace.

The plaintiffs, failing to give the bond, were, by the respondent Holmgreen as justice of the peace, committed to the custody of the respondent Loveland as sheriff of said county, and the commitment was received in evidence, and the sheriff took the plaintiffs to the county jail of Box Elder county at Brigham City and placed them therein, in the custody of his deputy and jailer, the respondent Baird; and on the second day of July, 1894, the appellants executed and filed their bond of security to keep the peace, and were thereupon immediately released from custody.

On the 18th day of October, 1894, the proceedings instituted before the respondent Holmgreen, as justice, were dismissed by an order of the Fourth judicial district court.

*R. H. Jones*, for appellants.

Where, as in this case, "but one detention is complained of, the party plaintiff may allege in his petition and prove on the trial such facts as show either a cause of action for false imprisonment or one for malicious prosecution or both." 14 Am. Encyc., p. 17, n. 1., citing, *Buer v. Clay*, 8 Kan. 580; *Neil v. Thorn*, 88 N. Y. 270; *Marks v. Townsend*, 97 N. Y. 590; *Barr v. Shaw*, 10 Hun (N. Y.) 580; *Bradner v. Faulkner*, 93 N. Y. 515; *Wagstaff v. Schippel*, 27 Kan. 450; 7 Am. Encyc. p. 687; n. 1. citing, *A. T. Ry. Co. v. Reese*, 36 Kan. 593.

The court erred in allowing Justice Holmgreen to testify that he acted in the capacity of justice. It was a question of law. *Vaughn v. Gordon*, 28 Am. Dec. 759; *Gurmon v. Raymond*, 6 Am. Dec. 202; *Tracy v. Williams*, 10 Am. Dec. 102; *Flack v. Harrington*, 12 Am. Dec. 171; *Lang v. Benedict*, 29 Am. Dec. 93; 7 Encyc. of Law, 669, note.

"A magistrate of inferior court acting without or in excess of jurisdiction, is liable in damages to the party injured thereby, and can show no legal justification under any judicial record. *Piper v. Pearson*, 61 Am. Dec. 438; *Clark v. May*, 61 Am. Dec. 471; *Bissell v. Gold*, 19 Am. Dec. 481.

*Evans & Rogers*, for respondents.

The finding of the justice, that there was just reason to fear the commission of an offense against the person or the property of Meaghr and others, is *conclusive evidence of probable cause*. *Crescent City Live Stock, etc., Co. v. Butchers' Union, etc., Co.*, 120 U. S. 141; *Whitney v. Peckham*, 15 Mass. 243; *Phillips v. Village of Kalamazoo*, 53 Mich. 33; *Spring v. Besore*, 12 B. Monroe 551; *Griffis v. Sellars*, (N. Car.) 31 Am. Dec. 422; *Parker v. Huntington*, 7 Gray 36; *Cooley on Torts*, p. 214; *Newell on Malicious Prosecution*, p. 299, sec. 22.

Under the same facts and circumstances the action for false imprisonment as against respondent Meaghr, the prosecuting witness, will not lie. *Gillet v. Thiebold*, 9 Kan. 292; *Billings v. Russell*, 23 Pa. St. 189; *Landt v. Hilts, et al.*, 19 Barb. 283; *Lancaster v. Lane*, 19 Ill. 242; *Barker v. Stetson*, 7 Gray 53; *Stanton v. Schell*, 3 Sanford 329; *Marks v. Culmer*, Id. 12.



ZANE, C. J.:

This action was brought to recover damages for the alleged malicious prosecution of the plaintiff Annie Johnston. The other defendant is her husband. They allege in their complaint that William H. Rowe was receiver of the Bear Lake & Bear River Irrigation & Canal Company, and that he and the other defendants on June 28, 1894, at the county of Box Elder, in the state of Utah, maliciously and without probable cause, instituted a prosecution before a justice of the peace against the plaintiff Annie Johnston; that they falsely alleged in their complaint that she had threatened to assault defendant Meaghr and others with deadly weapons; that the justice issued a so-called warrant upon such representations; that the defendants thereupon by force compelled her to go with them to Bear River City, in that county, where they unlawfully, maliciously, and without probable cause, imprisoned her; that they then forced her to go to Brigham City; that they imprisoned her and her infant child there in a noisome jail for the space of five days; that the justice of the peace discharged her from the proceedings to keep the peace on the 7th day of July following; and that the district court, to which the case had been taken, dismissed the same on the 18th day of October of the same year. And they alleged damages, special and general, and demanded judgment in a sum named. Thus, the plaintiffs allege that the defendants maliciously and without probable cause prosecuted the plaintiff; and they characterized the warrant upon which she was arrested as a "so-called warrant," and aver that the defendants imprisoned her unlawfully, maliciously, and add that they imprisoned her without any right or authority. In view of the fact that the complaint was not demurred to,

and that the Code has adopted one form for all civil actions, plaintiffs' counsel argues, in effect, that the defendants might be found guilty of false imprisonment, or malicious prosecution; that the court might regard the complaint as stating both or either of those causes of action. In so doing, counsel, in effect, insists that the cause of action may be regarded as based on a trespass committed by defendants against the plaintiff, by unlawfully arresting and detaining her without any legal authority, or on the ground that defendants maliciously, falsely, and without probable cause, prosecuted her. There is but one count in the complaint. Two causes of action are not separately stated. If plaintiffs' position is sound their cause of action stands on a want of probable cause and malice, and also on a trespass. The gist of the one cause of action is the institution of the suit without probable cause, and with malice. The gist of the other cause of action is the unlawful, direct, and forcible invasion of a personal right,—of a person's right to liberty. The foundation fact of each cause of action differs essentially. One charges defendants with directly doing an unlawful act. The other charges them with maliciously and unlawfully causing the magistrate to issue the warrant which caused the constable to make the arrest. "Although any particular fact may be the gist of a party's cause, and the statement is indispensable, it is still a most important principle of the law of pleading that in alleging the fact it is unnecessary to state such circumstances as merely tend to prove the truth of it. The dry allegation of the facts, without detailing a variety of minute circumstances, the evidence of it, will suffice. \* \* \* The object of the science of pleading is the production of a single issue upon the same subject-matter of dispute. The rule relating to duplicity

or doubleness tends more than any other to the attainment of this object. It precludes the parties,—plaintiff as well as defendant,—in each of their pleadings, from stating or relying upon more than one matter constituting a sufficient ground of action in respect to the same demand, or a sufficient defense to the same claim, or an adequate answer to the precedent pleading of the opponent. The plaintiff cannot, by the common-law rule, in order to sustain a single demand, rely upon two or more distinct grounds or matters, each of which, independently of the other, amounts to a good cause of action in respect of such demand.” 1 Chit. Pl. 125, 126.

While section 3126, 2 Comp. Laws Utah 1888, declares that “there is in this state but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs,” and while all distinctions as to the forms of civil actions are abolished, distinctions as to the causes of actions remain. At the common law “the joinder of actions often depends on the form of the action, rather than on the subject-matter or cause of action.” 1 Chit. Pl. p. 199. This author further says that: “The science of special pleading may be considered under two heads: (1) The facts necessary to be stated; (2) the form of the statement.” Page 214. In other words, the statement of the cause of action, and the form of the statement. The Code adopts one form for all civil actions, but the facts constituting the various causes of action for which that form is prescribed must differ, as the relationships of the persons claiming rights and the performance of duties must differ; and, as the relationship of the persons against whom such claims are made must differ, the subjects and objects to which such rights and duties must relate, and about which litigation may arise, must differ. Causes of action

arising amid the complicated and varying relationships, conditions, circumstances, and situations of human affairs must differ, and each cause should be described by a statement of its appropriate facts. They should not be jumbled together, to produce confusion and error. Each contract, liability, right, or duty should be separately stated. The particular breach, violation, or negligence should be averred, for each constitutes a distinct cause of action, and each cause should be separately stated that they may be understood. As we have seen, at the common law distinct causes of action cannot be blended in one statement,—one count. And this rule the Code has adopted and declared. At common law the joinder of counts in the same complaint was ordinarily, though not always, determined by the nature of the cause of action. Such joinder must be determined, in all cases, under the Code. In section 3220, 2 Comp. Laws Utah 1888, the causes of action that may be united in the same complaint are classified according to their subject-matter, and, after dividing them into seven classes, the section concludes: "The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to person." This rule authorizes the joinder of a count for malicious prosecution with one for false imprisonment, in the same complaint, but requires them to be separately stated; that is to say, embraced in distinct counts. We have been more careful in the consideration of the point, because the cases of *Railroad Co. v. Rice*, 36 Kan. 593, and *Bauer v. Clay*, 8 Kan. 580, to which we

have been referred, may be understood as announcing a different rule. Those cases do not clearly distinguish the rule applicable to forms of action from the rule applicable to causes of action.

The foregoing presents the question for determination: Do the facts stated in the complaint describe a cause of action for malicious prosecution, or for false imprisonment? The warrant issued, and upon which the plaintiff Annie Johnston was arrested, is characterized as a "so-called warrant." It is not alleged that the warrant was void, nor do the facts alleged authorize the court to regard it as absolutely void and of no effect. In construing a pleading upon demurrer, the maxim is "that everything shall be taken most strongly against the party pleading, or, rather, that, if the meaning of the words be equivocal, and two meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading, because it is to be presumed that every person states his case as favorably to himself as possible." But no demurrer was presented to this complaint, and we are called upon to apply the rule applicable after trial, verdict, and judgment, in the light of the evidence, the action of the court, and concessions of parties. And that maxim is, as we think, "that the language of the pleading is to have a reasonable intention and construction, and, where an expression is capable of different meanings, that shall be taken which will support the declaration, etc., and not the other which would defeat it." 1 Chit. Pl. p. 237. Though the meaning of the words of the complaint under consideration may be equivocal, and one meaning supports the count as stating a cause of action for malicious prosecution, and the other does not, we must adopt the former, because that supports the complaint. We must therefore regard the count

under consideration as stating a cause of action for malicious prosecution.

At the conclusion of the evidence and examination of the witnesses, the jury returned a verdict for the defendants, as the court had instructed them. And the court then entered a judgment on the verdict against the plaintiffs, and for the costs incurred in the prosecution and defense of the case. From this judgment the plaintiffs took this appeal, and they assign the instruction to return a verdict for the defendants as error.

If there was a substantial conflict in the evidence before the jury as to whether the defendants, or either of them, caused the prosecution mentioned in the complaint to be commenced, and as to whether the plaintiff Annie Johnston made the threats mentioned in the complaint upon which the warrant against her issued, and as to whether such defendants, or either of them, had a reasonable fear that the crime threatened would be committed, then the instruction excepted to was erroneous. Or, if reasonable men might differ as to the existence of those facts, the instruction was erroneous. Before finding against the defendants, or any of them, the jury were required to believe, from a preponderance of the evidence, that they caused the prosecution, and did not have reasonable cause to believe that plaintiffs made the threats, or that they did not have a reasonable fear that the crime threatened would be committed. And if the evidence left room for a difference of opinion among reasonable men as to the existence of those facts, the court was bound to submit the evidence to the jury. Section 4796, 2 Comp. Laws Utah 1888, authorizes an information to be laid before a magistrate, that a person has threatened to commit an offense against the person or property of another. And section 4798, Id., authorizes the magistrate

to issue a warrant for the arrest of such person, if it appears from the depositions that there is just reason to fear the commission of the crime threatened. Probable cause for a criminal prosecution is equivalent to reasonable cause, and consists of facts in the mind of the prosecutor sufficient to lead a person of ordinary caution to believe that the party to be prosecuted is guilty, or, as applied to this case, that the offense was threatened by Annie Johnston, as stated, and that there was just reason to fear that the crime threatened would be committed. Inasmuch as the court, in giving the charge excepted to, must have assumed that the evidence proved the threats charged probable cause, and the absence of malice, and that there was no substantial conflict in the evidence as to the existence of these facts, we are bound to consider the evidence, in order to determine whether the court announced in its charge the rule of law applicable to the evidence before the jury. While the ninth section of article 8 of the state constitution declares that "in cases at law the appeal shall be on questions of law alone," this court will review the ruling of the court in the case, and will examine the evidence with respect to which it was made, and to which it was applied. Without understanding such evidence, this court cannot decide whether the ruling was right or wrong.

It appears from the evidence that the plaintiffs have been in the actual possession of the tract of land about which this contention arose 16 or 17 years; that plaintiff Annie Johnston claimed to own it; that the tract had been inclosed with a fence, but that it was down at the time and at the place where the defendants attempted to enter; that Meagher, the prosecutor, and the defendant Rowe, who directed the entry and prosecution, knew that plaintiffs were in the actual possession of their claim;

that Meaghr went to the plaintiff's house on the land the day before the attempted entry was made, and sought plaintiffs' consent to construct an irrigating ditch across the same, which they refused. It also appears that on the morning of the day the defendant Meaghr, with two other men, all directed by Rowe, with a team of four horses, and a plow, attempted to enter upon plaintiffs' land to construct a lateral ditch across the same to the land of one Tarpie; that the plaintiff Annie Johnston, with a stick six or eight feet long, about the size of a broom handle, with a tack in one end of it, met them at the boundary of her land, and forbade them to enter; that they attempted to drive on, regardless of her prohibition; that she applied the tack and stick to the horses, and turned them aside; that the other plaintiff, her husband, was on a horse about 100 feet away, and had a Winchester rifle, which both plaintiffs testified was not loaded, but was used as a bluff; that he also had a pistol, which he said was for defense in case of personal violence. It also appeared that he made some threats in case the defendants persisted in entering the land; that, after two or three attempts to enter, the defendants went away. It does not appear that the women had any deadly weapon, and it appears that she was small. Defendant Meaghr testified that he had no fear of the woman or the man before or after the attempt; that he heard her say the land was hers, and that she would defend it. Witness Rowe testified that he gave one Jarvis orders to bring the case before the prosecuting attorney for prosecution, and in an affidavit in evidence he said that: "Provided Mr. Johnston would allow a ditch to be peaceably constructed, there would be no more objection. What we require is to have that ditch constructed, from my own standpoint."



Undoubtedly the plaintiffs were co-operating to prevent the defendants Meaghr and Rowe from taking their land for a ditch, and the husband threatened to shoot Meaghr and the men that were with him, if they persisted, and his wife, though not armed with any deadly weapon, was sanctioning such threats, and using her stick on the team as they passed on to the land; and, if the entry had been persisted in, there was probably some danger that the husband would shoot. But were such threats, made upon the condition that if defendants persisted in an unlawful purpose, and a forcible and unlawful act, such as sections 4796 and 4798, cited, contemplate? Can one who attempts to take possession of another's land, who is in actual possession, forcibly and unlawfully, when the other forbids, resists, and threatens to shoot, have him arrested and bound over to keep the peace, while he unlawfully appropriates the land to his own use? Can a party, by swearing that he fears another will commit a threatened crime against him if he persists in trespassing on his property, require the other to give a bond to keep the peace while he does the unlawful act? Peace warrants and bonds to keep the peace are not intended to protect men in doing unlawful acts against others. Their object is to secure an observance of law, not to encourage its violation. It does not appear that the defendants proposed to take plaintiffs' land for a public purpose, but this question it is not necessary to decide, because there was no attempt to take it by virtue of the right of eminent domain. No condemnation proceedings had been instituted. The plaintiffs were in actual possession, and that was *prima facie* evidence of title in fee simple. 1 Greenl. Ev. § 109. "Mere occupancy of land, however recent, gives the possessor a title against one who cannot show a better claim, and is sufficient to

enable him to maintain an action against a stranger." 2 Wat. Tresp. p. 246; *Look v. Norton*, 55 Me. 103; *Kilborn v. Rewee*, 8 Gray 415.

The plaintiffs had the legal right, as against defendants, to defend their possession by any degree of force short of taking human life. 1 Bish. Cr. Law, §§ 857, 861. The plaintiff Annie Johnston did no more than defend her possession against persons who were attempting to take possession of a portion of it and appropriate it permanently to their use without any legal right whatever. It does not appear that there was any probable cause for the prosecution of the plaintiff, and it does not appear that the facts were fully and fairly stated to a competent attorney at law before the prosecution was instituted, and that the prosecution was upon such advice. It is true that the justice decided in favor of the prosecution, and held the plaintiff Annie to give a bond to keep the peace; but when the case was brought before the district court the prosecuting attorney, for the territory, said that probable cause did not exist for the prosecution, and dismissed it. Judgments of magistrates against defendants in prosecutions to bind persons to keep the peace, and in preliminary examinations, are not conclusive. They simply furnish a *prima facie* presumption of probable cause. *Diemer v. Herber*, 75 Cal. 287; *Newell*, Mal. Pros. p. 290; *Bacon v. Town*, 4 Cush. 217.

The order holding the plaintiff to bail should have been submitted, with all the other competent, relevant, and material evidence, to the jury, upon the issue of probable cause and malice, under proper instructions.

We are of the opinion that the court erred in instructing the jury to find the issues for the defendants William Meaghr and William H. Rowe. A case for malicious prosecution was not made against the other defendants.

Whether one for false imprisonment against them was shown, it is not necessary to decide as the case stands.

Plaintiffs' counsel, on the trial of this case, offered to prove by witness Annie Johnston that defendant Rowe said at the trial that he informed plaintiff Johnston that he would make the ditch through the land; that, when Johnston opposed his men, he had instructed Meaghr to go and commence the criminal proceeding, so that he could construct the ditch through the land; and that, if Johnston would promise to let the ditch be constructed peaceably through the land, he would then stop the prosecution. The court sustained an objection by defendants' counsel to this offer, and plaintiffs excepted. This testimony was competent, relevant and material upon the issue of probable cause and malice. It would have tended to show the purpose of the prosecution by defendant Rowe,—that it was not to prevent the commission of a threatened crime. It was admissible as against the defendant Rowe.

The record does not clearly present the evidence, objections, exceptions taken, and the ruling of the court upon which other errors are predicated and assigned, and we will therefore not consider them. For the reasons stated, the judgment appealed from is reversed, and the court below is directed to grant a new trial, and to permit such proper amendments as may be necessary to a trial of the case on its merits.

BARTCH and MINER, JJ., concur.

JOHN R. SAWTELLE, APPELLANT, v. THE NORTH  
AMERICAN SAVINGS, LOAN & BUILDING COM-  
PANY, RESPONDENT.

LOAN AND BUILDING COMPANY—STOCK—MORTGAGE—ACTION TO  
CANCEL.

1. H. subscribed for 17 shares of stock in the North American Savings, Loan & Building Company, a corporation existing under the laws of the state of Minnesota, and doing business in this state. Under his contract and the by-laws of the company, he was to pay \$10.20 dues on the shares each month, until such monthly payments, together with the profits arising from interest on loans, premiums, and other sources, apportioned to the shares, would amount to \$100 per share, or in the aggregate to \$1,700. On these 17 shares H. procured from the corporation a loan of \$850, and evidenced the same by a promissory note which he secured by mortgage upon certain real property. At the same time he transferred to the corporation, absolutely,  $8\frac{1}{2}$  shares of his stock, as premium for the loan, and, as further security, assigned to it the other  $8\frac{1}{4}$  shares. By this contract he was to pay interest monthly on the sum loaned at the rate of six per cent. per annum, and continue to pay the dues and interest until the stock matured and was worth \$100 per share, when it was to be received by the corporation in satisfaction of the loan. Afterwards H. sold the mortgaged property to S., who took the same subject to the mortgage, and assumed and agreed to pay the indebtedness secured thereby in the manner therein provided. When S. purchased the property he had no knowledge of the effect of the provisions of the mortgage, was not aware of the absolute assignment of the  $8\frac{1}{2}$  shares of the stock, had no interest in the stock, and was not a member of the corporation. The interest and dues were paid until a time when the dues paid aggregated \$367.20.

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S. then notified the corporation, in accordance with its by-laws, of his intention to pay the loan, and, claiming the right to apply the amount of the dues paid in reduction of the mortgage indebtedness, tendered it the sum of \$500, as the balance due. The corporation claimed that only one-half of the amount of such dues could be so applied, because of the absolute assignment of one-half the stock, and refused to accept the tender. S. thereupon brought this action to cancel the mortgage. *Held*, that the \$367.20 paid as dues on the stock must be applied in reduction of the debt.

2. *Quære*: Whether such contracts as H. entered into, although valid under the laws of Minnesota, could be enforced under the laws of this state, as between a member and the corporation; this question not being decided.

(N. 750. Decided March 22, 1897.)

Appeal from the Second district court, Weber county.  
Hon. H. H. Rolapp, *Judge*.

Suit by John R. Sawtelle against the North American Savings, Loan and Building Company. Decree for defendant. Plaintiff appeals. *Reversed*.

*H. H. Henderson*, for appellant.

*Richards & Macmillan* and *A. E. Pratt*, for respondent.

The relation of stockholder and borrower are distinct and may exist independently of each other. *Sweeney v. Ass'n.*, 26 S. W. 290; *Blakeley v. Ass'n.*, 26 S. W. 292; *Association v. Furey*, 20 Atl. 890.

The mortgage itself contained sufficient to put him on inquiry. *Lang Syne M. Co. v. Ross*, 20 Nev. 137; Sec. 373; *Jones on Mtgs.*, vol. 1; 2 Pom. Eq. Jr., sec. 608.

That the plaintiff elects to pay this loan before ma-

turity does not change the situation. *Boone v. Homestead Loan Ass'n.*, 23 N. Y. S. 203; *Association v. Read*, 93 N. Y. 479; *Association v. Tascott*, 32 N. E. 377; *Sullivan v. Association*, 12 So. 591; *Association v. Conover*, 14 N. J. Eq. 223.

BARTCH, J.:

The defendant in this case is a corporation organized and existing under the laws of the state of Minnesota, and is doing business in this state. It appears from the record that one Charles J. Humphries on December 20, 1891, subscribed for 17 shares of its capital stock, and received a certificate therefor on April 11, 1892, and that the certificate was issued on the condition that the shareholder agreed to pay to the defendant corporation 60 cents monthly for each share, until such monthly payments, together with the profits arising from interest on loans, premiums, and other sources, apportioned to such share, amount to \$100. If a monthly payment was not promptly made when due, a fine of 10 cents per share was to be imposed. On the 18th of April, 1892, Humphries procured from the corporation a loan of \$850 on his 17 shares of stock, making and executing, as evidence thereof, his certain promissory note, and on the same day, as further security for the payment of the sum borrowed, he made, executed, and delivered to the corporation a mortgage on the property mentioned and described in the pleadings herein. The note was made payable after three years from date thereof, and before nine years from date, and at a time when each share of his stock would be of the value of \$100. The note provided for interest at the rate of 6 per cent per annum, payable on or before the second Tuesday of each month, until each share of the stock would mature and be worth \$100; and it contains a pro-

vision that if the maker shall fail to pay the monthly dues on the stock, or payments of interest, for a period of three months, the whole amount of the note shall become due and payable. The mortgage was conditioned for the payment of the \$850 and interest thereon at the rate, at the time, and in the manner specified in the note, —containing, among other things, a covenant to pay all fines and the monthly dues on the stock (which amount to \$10.20) each month until the stock has matured; and the mortgage also provides that if the maker of the note shall pay or cause to be paid to the corporation all fines and all installments of interest and dues, as and in the manner stipulated in the note, until the stock shall be fully paid and of the value of \$100 per share, “and before any of said installments of interest or monthly payments shall have been past due for a period of three months, and shall then surrender said stock to said company in payment of said note, then this deed shall be null and void, otherwise to remain in full force and effect.” In furtherance of this scheme, and as a part of the same transaction, and at the same time, Humphries, it appears, transferred absolutely, and without any other consideration,  $8\frac{1}{2}$  shares of his stock to the company, as premium for the loan, and assigned to it as collateral security the remaining  $8\frac{1}{2}$  shares. On May 25, 1892, Humphries conveyed the real property described in the mortgage to the plaintiff, who took the same subject to the mortgage, and assumed and agreed to pay the indebtedness secured thereby in the manner therein provided. But it appears from the plaintiff’s testimony that he did not see the mortgage at that time, that he supposed the mortgage was the same as any other, that he learned from the defendant the manner of making the payments, that he knew nothing about any stock, and that he never saw the

mortgage until he stopped payments. The court found that the plaintiff had no notice of the absolute assignment and transfer to the defendant of the  $8\frac{1}{2}$  shares of stock. The interest on the principal sum was paid to the 18th day of April, 1895, amounting to \$4.25 per month, and the dues on the stock to the 9th of April, 1895, amounting in the aggregate to \$367.20; but thereafter no further payments were made on the stock by the plaintiff, and on May 15th he gave notice to the defendant, in accordance with its by-laws, of his intention to pay the loan. On June 15, 1895, he tendered to the defendant the sum of \$500 in payment of the mortgage indebtedness, which tender was refused, and thereupon the plaintiff deposited the \$500 with the clerk of the court, for the use and benefit of the defendant, and instituted this suit to compel it to cancel the mortgage, pleading the tender to the association; and the defendant, in addition to its answer to the complaint, filed a cross complaint, in which it asked for a foreclosure of the mortgage.

There are a number of errors assigned on this appeal, but the principal contention between the parties relates to the application of the payments on the stock procured by Humphries. The plaintiff insists that the monthly payments of dues on the stock, aggregating the sum of \$367.20, should be applied as payment on the principal, and that the court erred in finding that one-half of it should be credited to the corporation in payment of dues on the stock absolutely assigned to it as a premium, and the other half thereof be applied in reduction of the principal. It is evident, in view of the fact apparent from the record, that this contention must be sustained. The plaintiff owns no stock of the corporation, has no interest in it, and can derive no benefit from it. He merely purchased the property which was mortgaged to the corpo-



ration, and assumed and agreed to pay the sum borrowed, with interest, having no notice that Humphries had transferred  $8\frac{1}{2}$  shares of his stock absolutely to the defendant. No doubt, in equity and justice, he is bound to pay the principal sum, with the interest stipulated. But is he bound to do more? Is he bound also to pay dues on stock in which he never had an interest, and assume the burden of a contract of which he had no actual knowledge? We are aware of no rule of equity which would effect such a result, under the facts and circumstances as they appear in this case, and think it quite clear that all the stock payments must be applied as payments on the debt, and that such was the principal purpose for which they were intended; and this even as between a borrowing member and the corporation. It seems difficult to perceive how, in such a case, the absolute assignment of stock as a premium can work a result materially different from its assignment as collateral security, because in either case, under the by-laws of the corporation, if the borrower continues the monthly payment of dues and interest until the stock matures, the stock cancels the indebtedness, and there is precisely the same consequence whether the stock was transferred as a premium or as a pledge. Whatever may be the form by which the stock of a borrowing member is transferred to the corporation, the ultimate object of the monthly payments is the extinguishment of the debt. This is true regardless of the efforts of the agents of such corporations to obscure the relationship of the payments to the principal sum. Whatever may be their ingenious devices to show to the borrower that the loan, in some mysterious way, pays itself, without his knowledge, and that the monthly payments of the dues are a profitable investment in stock, the fact is that the loans are paid by means of the monthly assess-

ments on the stock. This kind of a contract for the loaning of money is not such as to commend itself to the special favor of a court of equity, and while it is not necessary, and is not our intention, to pass upon its validity in this case, under the laws of this state, as between a member of the corporation, still it is important to notice the results which would flow from a specific performance of it, to see whether its literal enforcement, against one who is not a member of the corporation, and, at a time when he undertook to pay the loan, had no knowledge of the effect of its provisions, would be justified upon any principal of equity. Its complete performance would require, and such appears to be the contention of the corporation, the payment of \$10.20 dues and \$4.25 interest per month, with such fines and penalties as might be assessed, for a period of nine years, or until the 17 shares of stock became worth \$1,700; or, in other words, the borrower is to repay the \$850 loaned, with 6 per cent interest, payable monthly, and in addition thereto give the corporation a bonus of \$850, or in the aggregate \$2,159, and then the corporation will call the business square and the transaction at an end. The mere statement of such a proposition shows the contract to be a hard one, if not entirely unconscionable, and therefore we have no hesitancy in declaring that under the facts of this case, as they appear from the record, the \$367.20 paid as dues on the stock must be applied in reduction of the debt. *Randall v. Protective Union*, 42 Neb. 809; *Rowland v. Association*, 115 N. C. 825; *Tilley v. Association*, 52 Fed. 618; *Rowland v. Association*, 116 N. C. 877; *Robertson v. Association*, 69 Am. Dec. 145, 162.

Having reached this conclusion, we do not deem it necessary to consider the cross appeal, nor is it important to discuss any other questions raised in the record. The

cause is reversed and remanded, with directions to the court below to modify the findings and dispose of the case in accordance with this opinion.

ZANE, C. J., and MINER, J., concur.

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JAMES C. ARMSTRONG, RECEIVER OF THE CITIZENS'  
BANK OF OGDEN, UTAH, APPELLANT, v. THE  
CACHE VALLEY LAND AND CANAL COM-  
PANY ET AL., RESPONDENTS.

PROMISSORY NOTE—ESTOPPEL—GUARANTY—CONSIDERATION—VOID-  
ABLE CONTRACT—ELECTION—OFFICIAL SIGNATURES—EVIDENCE.

1. R. was president of the defendant, and vice president and manager of the bank for which plaintiff was receiver, and W. was at the same time secretary for both companies, when the note sued upon was given by the defendant company, and signed: "Cache Valley Canal Co., Theo. Robison, Pres. R. H. Whipple, Sec." It appears that the note in question was given for another note, and interest on the latter, which was signed and guarantied by R. and W., and that, when the exchange was made, collateral security in bonds was given in the place of the guaranty, but that, four or five days later, defendants R. and W., without any consideration, guarantied the note. *Held*, that R., as manager of the bank, might substitute the note sued on, and the collateral security thereon, for the former note and guaranty, without the consent of the directors, if he had habitually exercised such authority to the knowledge of the board, and without objection, as the board would be estopped from denying the authority of the manager; and, since the transaction was conducted by officers of the bank, the presumption is that they knew the extent

of their authority. The second guaranty, being signed five days after the new note and collaterals were given, on the ground merely that the bank might wish to negotiate the second note, is not binding, since there was no consideration to support it.

2. The agreement of R. and W. to substitute the new note and collaterals for the old note and guaranty, by which they would discharge themselves, being officers of both corporations, was voidable only; and, to render the agreement void by returning the stock given as collateral, it must appear that all of the stock of any value was returned, or tender of all made.
3. Plaintiff cannot retain the bonds and the new note, and rely upon it in the action. A part of the transaction cannot be ratified and the rest repudiated.
4. Where the signers of a promissory note place the words, "President" and "Secretary" after their names, having first signed the corporate name, such words will not be considered mere surplusage, and the note will not be regarded as a joint note if the circumstances unmistakably indicate an intention not to sign the note as joint makers.
5. It is competent for plaintiff to offer in evidence a paper in which he has acknowledged the receipt of bonds and stocks constituting collateral security on the note sued on, when the purpose of such evidence is to contradict the testimony that the bonds were given in part to secure a second note, and in lieu of a guaranty signed by defendants R. and W.

(No. 753. Decided April 1, 1897.)

Appeal from the Second district court, Weber county.  
Hon. C. H. Hart, *Judge*.

Action by James C. Armstrong, receiver of the Citizens' Bank of Ogden, against the Cache Valley Land and Canal Company and others. From a judgment for defendants, plaintiff appeals. *Affirmed*.

*Richards & Macmillan*, and *A. E. Pratt*, for appellant.

Robison, as an officer of the Citizens' Bank, had no authority by virtue of his office to release himself and co-guarantors from their obligations upon the prior guaranty, nor to compromise with himself and co-guarantors their indebtedness upon the same. 4 Thompson on Corp. secs. 4751 and 4752.

Nor to make any representation that would have that effect. *Thompson v. McKee*, (Dak.) 37 N. W. 367; *Bank of U. S. v. Dunn*, 6 Peters 51; *Cochecho Nat. Bank v. Haskell*, 12 Am. Rep. 67; *Davis v. Randall*, 15 Am. Rep. 150.

And being an officer of the Cache Valley Land and Canal Co., and also one of the signers of the guaranty, he was not in a position to consent for the Citizens' Bank to any arrangement which would release his personal liability or that of his co-guarantors. *Gallery v. National Exchange Bank*, 41 Mich. 169; *Stevenson v. Bay City*, 26 Mich. 46; *Mathias v. Kirsch*, 33 Atl. 19; *Dykman v. Northridge*, 36 N. Y. S. 962.

The doctrine of estoppel cannot be invoked. *People v. Bank of North America*, 75 N. Y. 560.

The act of Defendant Robison was not a substitution of one security for another. *Wood Mowing & Reaping Co. v. Farnham*, 33 Pac. 867; *Nading v. McGregor*, 23 N. E. Rep. 283.

*Whipple & Johnson*, for respondents.

Notes of the same wording and identically the same in form, signing and all, have almost universally been held to be the contract of the corporation *only*, and not joint notes. *Farmers' Sav. Bank v. Colby*, 64 Cal. 352; *Latham v. Houston Flour Mills*, 3 S. W. Rep. (Tex.) 462; *Liebscher v. Cross*, 43 N. W. Rep. (Wis.) 166; *Thomp. on Corp.*, vol. 4, secs. 5134, 5148, 5149 and 5150.

"As between the original parties (and that is this case),

where a note is indorsed after delivery and without consideration, the indorsers are not liable." *Leverone v. Hildreth*, 80 Cal. 149; *Brown*, Stat. of Frauds, sec. 181; *Ware v. Adams*, 24 Me. 177; *Colborn v. Tolles*, 14 Conn. 341.

"Where the managing officer of a bank has no inherent power, he nevertheless binds the bank in many cases by usage. *Morse on Banks and Banking*, vol. 1, sec. 144.

"A bank, by suing on a note taken by its cashier under a contract made by him, ratifies the contract *in toto*, though he was unauthorized to make it." *LaGrange National Bank v. Blum*, 41 Pac. Rep. 659; *Planters' Bank v. Sharp*, 43 Am. Dec. 470 p. opin. 471; *Thomp. on Corporations*, vol. 4, sec. 5297, and note to sec.; *Teague v. Maddox*, 150 U. S. p. 126-128; *Eadie Guilford & Co. v. Ashbaugh*, 44 Ia. 519; *Thompson v. Spray*, 72 Cal. 528 p. opin. 533; *Hooker v. Hubbard*, 97 Mass. 175; *Bigelow on Estoppel*, 5th Ed. p. 681, and note.

ZANE, C. J.:

This action was instituted on a promissory note in the words following: "\$10,333.00. Ogden, Utah, Dec. 20, 1893. Six months after date, for value received, we promise to pay to the Citizens' Bank of Ogden, Utah, or order, ten thousand three hundred and thirty-three dollars, at the Citizens' Bank of Ogden, Utah, with interest from date at ten per cent per annum, payable annually until paid, both before and after judgment; and, if suit be instituted for the collection of this note, agree to pay ten per cent attorney's fee. And, if interest is not paid when due, it is to become part of the principal, and bear same rate of interest. Cache Valley Land and Canal Co. Theo. Robinson, Pres. R. H. Whipple, Sec." And the guaranty written thereon as follows: "For value received, I hereby guaranty the payment of the within note at maturity,

waiving demand, notice, and protest of same. Theo. Robison. R. H. Whipple. Corey Brothers & Co." The answer admitted the cause of action as alleged against the Cache Valley Land & Canal Company, but denied the liability of the other defendants, for the reasons, as averred, that the alleged guaranty was merely an accommodation indorsement, and without any consideration whatever. It appears from the evidence that defendant Theodore Robison was the vice president and manager of the bank, and president of the defendant corporation, at the time of the execution of the note and guaranty, and that defendant R. H. Whipple was at the same time secretary of both corporations; that in February, 1893, the defendant company borrowed of the bank \$10,000, and executed a promissory note therefor similar to the one declared on, and that the other defendants guarantied its payment; that this note and guaranty were renewed twice thereafter, and that on the 20th day of December of the same year the defendant Robison accepted the note of the defendant company sued on, and \$75,000 of its bonds, and \$30,000 of its stock, as collateral security, and surrendered the old note. These bonds and stock the defendants Robison and Whipple testified were taken as security in the place of the guaranty on the preceding note. Assuming the transaction to be binding, its effect was to satisfy and cancel the old note, and to substitute the new one in its place, and to discharge the guarantors from further liability as such, and to make the stocks and bonds delivered the sole security for the payment of the debt. The substitution of the new note, with the collaterals for the note surrendered, amounted to a satisfaction of the latter, if the parties so agreed. Daniel, Neg. Inst. (3d Ed.) §§ 1287, 1292; Wait, Act. & Def. p. 421.

It is claimed, however, that Robison, the vice president

and manager of the bank, was not authorized to accept the new note for the old, and substitute the stocks and bonds as security for the guaranty, and discharge the guarantors, without the consent of the directors. Such is the law, unless the manager habitually exercises such authority, to the knowledge of the board, and without objection. If the board allows the manager to hold himself out as possessing such authority, it will be estopped to deny that he had the power, after third persons have, in good faith, acted on such appearances. But this transaction was conducted and consummated by officers of the bank, and we must presume that they knew the extent of their authority.

The plaintiff claims, further, that the defendants Robinson and Whipple, being officers of both corporations, could not make a valid agreement to substitute the collateral security for their guaranty, and discharge themselves. Such an agreement was voidable, but not absolutely void. The bank could repudiate such an agreement, or it could affirm and ratify it. On the trial the receiver tendered to the defendants all the stock he received, but how much that was does not appear from the record. In order to avoid the agreement, the plaintiff should have tendered back all that it received upon it that was of any value. The plaintiff retains the bonds and the new note, and has relied upon it in this case. This the bank cannot do, and insist upon disregarding the transaction, for the reason that its manager was not authorized to make it, or because, as manager of the bank, he made the agreement, and was also one of the persons with whom the agreement was made. The bank could not ratify a part of the transaction and repudiate the rest. It should have adopted the whole, or none. *Bank v. Sharp*, 43 Am. Dec. 470; *Bank v. Blum*, (Or.) 41 Pac. 659; 4 Thomp. Corp. §§ 5286, 5317.



The same witnesses testified further that five days after the transaction the defendant Robison said to Whipple that it would look better if the guaranty was on the new note, as it was on the old one; that the bank might wish to negotiate it. Under these circumstances, both witnesses stated, they signed the guaranty, and that they did so without any consideration whatever. Assuming these statements to be true, the guaranty is one in form simply, and has no consideration to support it. If the bank, at the time the alleged guaranty was given, had proposed to repudiate the transaction by which the note with the stocks and bonds were accepted for the note and guaranty surrendered, and the guarantors to prevent such repudiation, and the setting aside of the transaction, because its manager had no right to make it, and such purpose to repudiate and set aside had been abandoned in consideration of the execution of the guaranty sued on, a different case would have been presented.

The plaintiff also insists that defendants Robison and Whipple were joint makers of the note with the Cache Valley Land & Canal Company; that the term "President," that follows the one name, and the term "Secretary," that follows the other, should be treated as surplusage. It appears from the record that the loan by the plaintiff was to the corporate defendant, and that defendants Robison and Whipple received no part of it; that, five days after the execution and delivery of the note and collaterals, they signed the guaranty on the note. These facts, as well as the use of the names of their respective offices, unmistakably indicate an intention not to execute the note as joint makers, and that they signed their names with their official designations under the name of the corporation, with an intention simply to make the note binding upon the latter. *Bank v. Colby*, 64

Cal. 352; 4 Thomp. Corp. §§ 5134, 5135, 5138; *Latham v. Houston Flour Mills*, (Tex. Sup.) 3 S. W. 462.

On the trial of the case the plaintiff offered in evidence a paper bearing date August 10, 1893, in which the plaintiff acknowledged the receipt of the \$75,000 of bonds, which, with the \$30,000 stock, constituted the collateral security of the note sued on. To this offer the court sustained defendants' objection, and plaintiff excepted, and assigns the ruling of the court as error. The purpose of the evidence was to contradict the testimony that the bonds were given in part to secure the last note, and in lieu of the guaranty of Robison and Whipple. While the ruling of the court sustaining the objection to this receipt was erroneous, we do not think it would have changed the result had it been admitted, in view of the fact that the plaintiff relies on the note obtained by the transaction, and the same bonds, with the stock, were taken as collateral security for the note in suit. Though the ruling was wrong, we do not regard it as reversible error. We find no reversible error in this record. The judgment is affirmed.

BARTCH, J., and McCARTY, District Judge, concur.

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CHARLES MAYNARD, RESPONDENT, *v.* LOCOMO-  
TIVE ENGINEERS' MUTUAL LIFE AND ACCI-  
DENT INSURANCE ASSOCIATION, APPELLANT.

MUTUAL BENEFIT INSURANCE—BY-LAWS—FINDINGS—JUDGMENT.

1. M. was a member of the defendant association, and received an injury in June, 1893, which resulted in the loss of the sight of his right eye. One of the objects of the association is to transact the business of life and accident insurance. M. brought suit to recover on two of its policies, basing his action on a by-law which provides that "any member, while engaged in any lawful vocation, receiving any bodily injuries which will alone cause \* \* \* the total and permanent loss of one or both eyes, he shall receive the whole amount of his policy." This by-law was adopted on May 26, 1894, after M. received his injury. *Held*, that the by-law is not by its terms retroactive, and, considered by itself, does not include a case where the injury which caused the loss of eyesight occurred prior to its passage; there being no reference in the pleadings to any other by-law which would authorize the inference that the one in question was to apply to such a case. *Held*, further, that the finding of the court that another by-law was in existence, when there was no reference to it in the pleadings, was a finding of fact outside of any issue, and that such findings cannot be considered, although, if the by-law had been properly pleaded, it would have an important bearing in the determination of the case.
2. Where a fact is found outside of any issue, it is nugatory and of no effect, and cannot be considered as supporting the judgment.
3. A finding of fact on a material issue should be express and distinct, whether it be as to an issue made by the denial

of an allegation in the complaint, or by a denial presumed by law of an averment in the answer.

4. When the facts are found, it must affirmatively appear therefrom that they support the judgment, or else the judgment will be subject to attack on appeal.

(No. 754. Decided March 8, 1897.)

Appeal from the Second district court, Weber county.  
Hon. H. H. Rolapp, *Judge*.

Action by Charles Maynard against the Locomotive Engineers' Mutual Life and Accident Insurance Company for an injury sustained in the loss of an eye. From a judgment for plaintiff, defendant appeals. *Reversed*.

*Richards & Macmillan* and *Arthur E. Pratt*, for appellant.

*H. H. Henderson*, for respondent.

BARTCH, J.:

The plaintiff was a member of the defendant corporation, and brought this action to recover the sum of \$3,000, on two certificates of membership, in the nature of insurance policies, each for \$1,500, for the permanent loss of the eyesight of his right eye, caused by an injury received in the pursuit of a lawful vocation. The cause was tried by the court without a jury, judgment entered in favor of the plaintiff, a new trial refused, and thereupon the defendant appealed.

The only assignment of error which we deem it necessary to consider in this case is the one to the effect that the judgment of the court is not supported by the findings of fact. The court found that the defendant was incorporated on March 1, 1894; that, for a period of 25 years prior to that time, it had existed as an unincorporated voluntary association; that when it became incorporated it

took all the property and assumed all the liabilities of the voluntary association; that its object at all times has been to transact the business of life and accident insurance on the assessment plan, for the purpose of mutual protection and relief to its members, and the payment of stipulated sums of money to the families, heirs, executors, administrators, or assigns of its members; that the plaintiff received the injury which caused the loss of his right eye in June, 1893; that the "loss of said right eye did not become permanent for about ten or twelve months after June, 1893;" and that the by-law of the association on which the plaintiff founded his cause of action was adopted and took effect on the 26th of May, 1894. That by-law, so far as material here, reads as follows: "Any member, while engaged in any lawful vocation, receiving bodily injuries which will alone cause \* \* the total and permanent loss of one or both eyes, he shall receive the whole amount of his policy." This is not by its terms retroactive, but prospective merely, and, considered by itself, does not include and provide for a case like the one at bar, where the injury which caused the loss of eyesight occurred prior to its passage. In form, it is present and future, and does not refer or apply to past occurrences. Whether or not there are other by-laws of the association, adopted either before or after the plaintiff received his injury, which would show that the one under consideration was intended to have a retroactive effect, we are unable to determine, in the absence of reference in the complaint to any such by-laws. Nor is there anything in the abstract or transcript, which we can legitimately consider, that authorizes the inference that the by-law in question was intended to apply to cases where the injury was received before its adoption. It is true, the court found that previous to its

incorporation the defendant had a by-law as follows: "Any member, while engaged in a lawful vocation, receiving bodily injuries which alone shall cause the amputation of a limb, whole hand or foot, or total and permanent loss of eyesight, he shall receive the full amount of his policy." This, however, is a fact found outside of any issue raised in the pleadings; for nowhere in the complaint or answer does there appear any reference to such a by-law, nor is its existence shown anywhere in the transcript or abstract, except in the findings of fact. A fact found outside of any issue cannot be considered as supporting the judgment, because facts not in issue need not be found, and, if found, the finding is nugatory and without effect. It may be that the voluntary association had at the time of the plaintiff's injury such a by-law as the one last above quoted, and, if such should be the fact, and the by-law had been properly pleaded, it would doubtless have an important bearing in the determination of this case; but the manner in which it appears in the record precludes its consideration for any purpose, and therefore we cannot read it, in connection with that of May 26, 1894, to ascertain whether the respondent has a right to recover. Under the pleadings as they appear in the record, the respondent's right to recover is based on the by-law of May 26, 1894, which, as we have seen, is not by its terms retroactive; and the court having found that the injury was received prior to its passage, it is clear that such finding does not support the judgment. Nor does it avail the respondent that the court found that the loss of eyesight did not become permanent "for about ten or twelve months after June, 1893." Such finding leaves the fact as to the date of the loss of sight in doubt, and this would become a material issue if it were to transpire that the date of injury was immaterial,

because, if the loss of sight occurred 10 months after June, 1893, it occurred before the passage of the by-law, and, if the loss occurred 12 months after that date, then it was after its passage. A finding on a material issue should be express and distinct, whether it be as to an issue made by the denial of an allegation in the complaint, or by a denial presumed by law of an averment in the answer. The facts are found for the purpose of disposing of the issues, and, when found, it must affirmatively appear that they support the judgment, or else the judgment will be subject to attack on appeal. Haynes, *New Trials & App.* § 242; *Railroad Co. v. Reynolds*, 50 Cal. 90; *Harlan v. Ely*, 55 Cal. 340; *Campbell v. Buckman*, 49 Cal. 362; *Johnson v. Squires*, 53 Cal. 37; *Elliott v. Peck*, Id. 85.

While it is evident that the findings of fact do not support the judgment, and that it cannot stand, still we are not satisfied that the respondent cannot ultimately recover the amount of his policies, if the complaint be carefully revised by amendment so as to present the issues suggested by the record in a proper manner. The cause is therefore reversed and remanded, with directions to the court below to grant a new trial and permit the parties to amend their pleadings, if they so desire.

ZANE, C. J., and MINER, J., concur.

W. S. McCORNICK, APPELLEE, v. HENRY SADLER,  
APPELLANT.

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ASSIGNMENT OF CLAIM—ACTION BY ASSIGNEE—EVIDENCE.

1. T. & K. were contractors, who built a house for S., upon which a certain sum of money was due on a certain day, and the same assigned for a valuable consideration to McC., subject to a deduction of any amount that might be a valid lien to subcontractors or material men. In a suit by McC. against S. for the amount assigned, *held*, that evidence of a prior assignment by T. & K. of portions of the fund to the subcontractors was properly excluded where it appears that T. & K. retained control of the fund and power of revocation until duly assigned to McC.
2. *Held*, also, that declarations by T. & K. in disparagement of title, made before assignment to McC., are admissible against him, and that it was error to exclude such declarations.
3. *Held*, that it was not error to exclude testimony of the architect as to the market value of material furnished for the house, the relation between the market value and the contract price not having been shown.
4. Testimony of a witness was rightly excluded where it was based solely upon a monthly statement not made by the witness, and of which he had no information, and neither the statement nor the books from which it was taken being offered in evidence.
5. After the books of M. & Co., one of the subcontractors or material men, were in evidence, it was competent to show that these books did not contain an account of all the material furnished by them to the contractors for S.'s house, as also a bill for glass, in the handwriting of the witness, sent to T. & K., the witness testifying that the glass went into the house in question, said bill should have been admitted in evidence with the other testimony for



what it was worth, and it was prejudicial error to exclude it.

- 6 After showing that all of certain material in the house was furnished by M. & Co., it was error not to admit testimony of the architect as to the quantity of such material in the house. *Held*, also, that the testimony that the material was not paid for as delivered should have been received in evidence.

(No. 775. Decided Jan. 28, 1897.)

Appeal from the Third district court, Salt Lake county.  
Hon. John A. Street, *Judge*.

Action by W. S. McCornick against Henry Sadler.  
From a judgment for plaintiff, defendant appeals. *Reversed*.

*Bennett, Harkness, Howat & Bradley and Charles Baldwin*,  
for appellant.

*Brown, Henderson & King and C. S. Varian*, for respondent.

HART, District Judge:

This case has twice before been considered on appeal by this court. 10 Utah 210, 11 Utah 444. The facts are that a co-partnership firm of contractors, Taft & Kropfganz, under a contract with the defendant, Sadler, built a house for him, upon which was due, on or about January 14, 1891, the sum of \$2,320.80, which on said day was assigned by a written order, executed by Kropfganz, to the plaintiff, McCornick, in consideration of an indebtedness of about the same amount due from said contractors on a bank account. The defendant was duly notified by plaintiff of the assignment. It was understood by plaintiff at the time of taking the assignment that there were some claims for material which were

liens upon the house, to be paid out of the fund due. This was also talked of by plaintiff and defendant at the time notice was given defendant of the assignment. This action is brought to recover the fund assigned, and the defense is that the full amount of \$2,320.80, was due certain parties for work and material furnished the contractors for the Sadler house, and the same actually paid by defendant after the assignment to plaintiff, as follows: Mason & Co. \$1,844, Irwin & Buse \$100, Spencer, Bywater & Co. \$71, and G. F. Culmer & Bros. \$305.80; that the right of lien existed for these several claims, and that the same were paid by defendant in pursuance of an agreement and assignment of the contractors made on January 10, 1891, for the payment by defendant of these several claims. The former decisions of this court determine that the burden of proof rests upon the defendant to establish the validity of the claims as liens in order to entitle him to a credit in this case of amounts paid by him to material men and laborers. In the last trial below it was admitted by the plaintiff that the sum of \$71 paid Spencer, Bywater & Co, and the sum of \$305.80 paid G. F. Culmer & Bros., were proper credits for the defendant, and the contest was made on the other two claims. It was admitted by plaintiff that the time for filing liens by subcontractors had not expired, and that defendant should have credit for any claims that were or would have been valid liens upon the defendant's house. A verdict was returned for plaintiff in the sum of \$1,524.35 principal and \$664.11 interest, and the defendant appeals, assigning as error numerous rulings, upon the admissibility of testimony. It will not be necessary to notice all the questions raised. All useful purposes will be subserved by selecting representative questions which will stand for classes.

Many of the questions asked by the defense of the defendant, and many of the interrogatories of the deposition of the witness Kropfganz, objected to by plaintiff, and sustained by the court, go to the question of whether there was a prior assignment by the contractors to Mason & Co., and Irwin & Buse, of the respective amounts due them. As it is apparent from the answers in the deposition of Kropfganz, and from the whole record, that there was not a valid assignment, prior to the assignment to the plaintiff, and that the contractors or assignors retained control of the fund and power of revocation, until the assignment was made to plaintiff, it is evident that the court did not err in excluding such testimony. A more serious question is whether declarations in disparagement of title made by Taft or Kropfganz, before the assignment to plaintiff, are admissible against the plaintiff in this action. The former decisions of this court determine the true relation of the defendant in this litigation to be that of the lien claimants; that he stands in their shoes, and "must defend from their bulwarks." It is also said that the plaintiff stood as the representative of the "assigned fund, which was representative of the building." 11 Utah, 447. But the "assigned fund" came to plaintiff from Taft & Kropfganz, and the question whether the declarations of the assignors should be admitted against the assignee was not before passed upon.

The plaintiff succeeded only to the rights of Taft & Kropfganz. Plaintiff's counsel admit the general rule that declarations in disparagement of the title of the declarant are admissible as original evidence, but claim that this rule applies to the title to the particular chattel or chose in action assigned. We do not see how this distinction can be claimed for this case. If it be true

that the assignors, during the continuance of their title to the fund, admitted that only a part of the fund really belonged to them, or that no part belonged to them, but to the subcontractors, who could file a lien, and thus require payment to them, it is difficult to understand why such a declaration does not go to the question of their title to the fund, and why the same should not be admitted under the general rule. This view would admit interrogatories and answers from 8 to 17, inclusive, of the Kropfganz deposition, excluded by the trial court, in reference to a book entry by Kropfganz, on or about January 12, 1891, as follows: "Lumber bill due Mason & Co. on Sadler job, \$1,718.22, time of settlement." If not admissible because of being a general entry,—a conclusion,—it would be competent as a declaration against title. If the declarant owed Mason & Co. what he admits by the above entry, the sum that he would be entitled to and could legally demand from the house owner would be diminished by that amount due Mason & Co., and which they had a lien claim for. If this action were by Taft & Kropfganz against Sadler, would it be contended that such declarations by them would not be admissible against them? The defendant should not be placed in a less advantageous position in his defense by reason of the assignment to plaintiff. The plaintiff should occupy no more profitable position than would his assignors in a suit by them. Defendant, then, should have been permitted to show, if he could, as he offered to, "that at a meeting between Taft & Kropfganz and Henry Sadler on the night or on the afternoon of the 10th of January, Taft & Kropfganz, who were the assignors of the claim of plaintiff, admitted that the amount due from them to Mason & Co. on account of material furnished for Mr. Sadler's house was \$1,718.22, and that

the amount due Irwin & Buse for material furnished for that house was something over \$100."

Before offering in evidence the books of Mason & Co., containing the account with Taft & Kropfganz, and before attempting to show that this account did not contain a full list and account of all the material furnished by Mason & Co. for the Sadler house, and before showing that the contract price of the material was the same as the market value, defendant attempted to show by the architect, Kern, the market value of the lumber, lath, sash and weights, doors, nails, and glass that were used in the house. This testimony was rightly excluded by the court at that stage of the trial.

Objection is made by the defense to the court not permitting the witness Mason, of the firm of Mason & Co., to testify from bills made by his clerk at the end of each month from the books of the firm, of the material furnished Taft & Kropfganz for the Sadler house. The witness did not write the bills, did not claim the bills were anything more than copies of the books, had no independent recollection of the items of the bills, and neither the bills nor the books were at this time offered in evidence. The only thing offered was the testimony of the witness, based solely upon the bills, and not even upon his own memory refreshed from an examination of the bills. Besides, no such exceptions were taken to rulings upon this testimony as can be relied on upon appeal. The account books of Mason & Co. with Taft & Kropfganz were subsequently produced, and admitted in evidence, after which defendant attempted to show that the books did not contain an account of all the material furnished by Mason & Co. In particular, a certain bill of glass, made out in the handwriting of the witness Mason, dated January 6, 1891, and sent to Taft & Kropfganz, for beveled

plates, for the Sadler house, in the sum of \$156.70, was offered in evidence, as showing material furnished and not paid for, and not charged for on any books that could be found. The witness testified that he made out the bill, and that the glass mentioned in it went into the Sadler house; supposed he made the bill from the books, but did not see it in the books in court; but some of the counter books were burned. This bill was excluded by the trial court. We think this testimony was clearly admissible, and that it was prejudicial error not to admit it. After the defense had shown that the lumber, lath, sash, weights, doors, nails, and glass for the erection of the Sadler house were furnished by Mason & Co., and after showing the items and prices thereof, so far as the same appeared by the books of Mason & Co. (now in the hands of their assignee, for the benefit of their creditors), it was competent to show by the architect the quantity of such material in the Sadler house, and it was error not to admit such evidence. Similar proof was attempted as to labor and material furnished by Irwin & Buse, but, as the exclusion of this testimony is not assigned as error, the same will not be further considered.

The defendant should have been permitted to show that no material furnished Taft & Kropfganz for the Sadler house was paid for as delivered, the theory of the plaintiff and the court being that, if material was furnished, and not charged on the books, the presumption was that the same was paid for. The books of Mason & Co. show that one single running account was kept by them with Taft & Kropfganz for material furnished for the building of several houses besides and including the Sadler house, and that marginal notations of the name of the owner of the house or the street number was the only

entry to indicate which house the material went into. In some instances these marginal notes are omitted, thus leaving nothing except parol evidence to determine which house the material was for. In view of the way in which the books were kept, as well as upon established general principles, the defendant should have been permitted to show, if he could, material furnished in addition to that shown upon the books. He was not precluded from showing that the books did not contain all the charges, and was not bound by the general statement of the one witness, Mason, made in answer to cross questions on behalf of the plaintiff, to the effect that an account was kept of whatever was furnished, in regular book form, and appears upon the books. This testimony was given before the books were produced in court, or examined by the witness, and it is doubtful if he would have so testified after examining the books. The defendant complains that certain book-account entries should not have been admitted against his objection, showing that Mason & Co. were paid \$1,000 on account of the Sadler house. There is a dispute between counsel as to whose book accounts these were, and the record fails to definitely disclose the fact, but they were probably Mason & Co's books, and, if so, were properly received in evidence. Defendant also claims that he should have been permitted to show that the \$700 payment was made by Taft & Kropfganz to Mason & Co., not on account of material for the Sadler house, but on the general account, in which event the payment would have to be applied by the creditor to the earliest items of the account. While, in general, this might be shown by the defendant, yet, in view of the testimony of the witness Taft for the plaintiff, that the payment of this item was made to Mason & Co. by an order on Sadler, and

presumably paid by him, and consequently rightly to have been credited to Sadler by Mason & Co., the question asked by defendant's counsel, and objected to and sustained, did not properly go to the question, as it then stood, of how the payment was made. If the payment was actually made to Mason & Co., by Sadler, the same would have to be credited to Sadler, and this would not be changed by the omission of Taft & Kropfganz to direct Mason & Co. to apply the same to any particular account, or to the account of the defendant Sadler.

There are a great many other questions of minor importance raised by this appeal, which are not necessary to discuss in this opinion, as they are not likely to arise again upon a retrial of this case. It is evident from the matters herein considered, and from an examination of the entire record, that such competent and material evidence was excluded as necessitates a rehearing. The judgment and order of the trial court is therefore reversed, and set aside, and the case is remanded for a new trial.

ZANE, C. J., and MINER, J., concur.



JOHN PETROVITZKY, APPELLANT, *v.* NAT M.  
BRIGHAM, RESPONDENT.

NONSUIT—WAIVER—APPEAL IN EQUITY—REVIEW—FRAUDULENT  
CONVEYANCES—SUFFICIENCY OF EVIDENCE.

1. The offer of evidence after the overruling of a motion for nonsuit is not a waiver of the exception taken to the order overruling such motion, under Sess. Laws 1894, p. 42.
2. Under section 9 of article 8 of the constitution, which provides that appeals to this court shall be upon the record made in the court below, “\* \* \* and that in equity cases, the appeal may be on questions of both law and fact,” *held*, that questions of both law and fact arising in equity cases can be reviewed in this court upon the record made in the court below, if properly brought to this court.
3. When there is no testimony offered by the plaintiff, in his affirmative case, tending to establish a *prima facie* case of fraud in the alleged sale of property with intent to defraud creditors, a motion for nonsuit should be granted. Fraud cannot be presumed from mere suspicious circumstances, but must be proved. Testimony offered *held* insufficient to make a *prima facie* case.

(No. 756. Decided Jan. 30, 1897.)

Appeal from the Third district court, Salt Lake county.  
Hon. John A. Street, *Judge*.

Action by Jacob Petrovitzky against Nat M. Brigham for conversion. From a judgment of nonsuit plaintiff appeals. *Reversed*.

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*Richard B. Shepard and Cherington & Harkness*, for appellant.

*Booth, Lee & Gray*, for respondent:

Cited: *Burdick v. Post*, 12 Barb. 172; *Crow v. Beardsley*, 68 Mo. 439; *Hickox v. Elliott*, 22 Fed. R. 21; *Crane v. Chandler*, 5 Colo. 21; *Porter v. Dement*, 35 Ill. 478; *Grassner v. Patterson*, 23 Cal. 332; *Dufficy v. Shields*, 63 Cal. 332; *Butte H. Co. v. Sullivan*, 7 Montana 312.

MINER, J.:

This action was brought to recover damages against the defendant for the unlawful conversion of certain personal property, upon which the plaintiff held a chattel mortgage made by Herman Jacobs to secure the payment of the sum of \$400, by virtue of which plaintiff claimed to be the owner of, and entitled to the possession of, the property. The defendant denies the conversion, but admits the taking and sale of the property, as United States marshal, under an execution issued upon a judgment against Herman Jacobs and Minnie Jacobs for the sum of \$222 and costs, and alleges that the mortgage was placed upon the property to hinder, delay, and defraud the creditors of the plaintiff, and that the mortgage was void because the parties thereto had failed to take, subscribe, and attach to said mortgage the oath required by the statute. Upon the trial the plaintiff was called as a witness, and identified the note and chattel mortgage in question, under which he claimed title, and offered the same in evidence. The defendant objected to the introduction of the mortgage in evidence for the reason that it was incompetent, and was not executed in compliance with the laws of this state with reference to chattel mortgages. The objection was sustained, and the mortgage

was rejected as evidence, the court holding that the affidavit was defective, because the word "hinder" was not used in it. The plaintiff's attorney here remarked, "If we are not allowed to introduce the chattel mortgage in evidence, we cannot prove our case, then, sir, and we rest right here." On motion of defendant the court granted a nonsuit, to which an exception was taken by plaintiff, and the ruling of the court assigned as error.

The following is a copy of one of the affidavits referred to:

"TERRITORY OF UTAH, }  
"County of Salt Lake, } ss.:

"J. Petrovitzky, of Salt Lake City, territory of Utah, being first duly sworn, says that he is the mortgagee named in the foregoing mortgage, and that the said mortgage is made in good faith for the purpose of securing the amount therein named, and without any design to delay or defraud creditors.

"J. PETROVITZKY.

"Sworn to and subscribed before me this 25th day of July, A. D. 1896.

"H. S. McCALLUM,  
"Notary Public."

Section 2801, Comp. Laws Utah, 1888, provides: "No mortgage of personal property shall be valid as against the rights and interests of any person (other than the parties thereto), unless the possession of such personal property be delivered to, and retained by the mortgagee, or unless the mortgage provide that the property may remain in possession of the mortgagor, and be accompanied by an affidavit of the parties thereto, or in case any party is absent an affidavit of the parties present, and of the agent or attorney of such absent party, that the same is made in good faith to secure the amount

named therein, and without any design to hinder or delay the creditors of the mortgagor." The mortgage contains a provision that the property should remain in the possession of the mortgagor. The language of the statute is, "and without any design to hinder or delay the creditors of the mortgagors." The affidavit reads, "without any design to delay or defraud the creditors." This affidavit was printed with the mortgage, on a form doubtless in common use. The question is raised whether the words "delay or defraud," as used in the affidavit, is a substantial compliance with the statute, without the use of the word "hinder." The words "hinder" and "delay" are used as synonymous terms. Webster's International Dictionary defines the word "hinder" as to check, retard, impede, delay, block, clog, prevent, stop, interrupt, counteract, thwart, oppose, obstruct, debar, embarrass. The same author defines the word "delay" to mean to hinder, detain, keep back, or retard. Webster's International Dictionary defines the word "defraud" to mean to deprive of some right, interest, or property by deceitful devices; to withhold from wrongfully; to injure by embezzlement; to cheat; to overreach, as to defraud a creditor." The Encyclopædia Dictionary defines the word "defraud" as meaning to deprive of a right by withholding from another, by indirection or device, that which he has a right to claim or obtain. The words "hinder" and "delay" are so practically of the same meaning that the omission of the word "hinder" in the affidavit does not substantially detract from the object of the statute, or lessen the force of the words used in the affidavit so as to make it defective, when used in connection with the word "defraud." A substantial compliance with the statute is all that is required. To hinder or delay is to do something with an intent to defraud; to place some obstruction in the path;

to interpose something, unjustifiably, before the creditor can realize what is due him out of his debtor's property. "To defraud" implies or includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another." *Burdick v. Post*, 12 Barb. 186; *Burnham v. Brennan*, 42 N. Y. Super. Ct. 63; Black, Law Dict. tit. "Hinder;" 1 Story, Eq. Jur. (13th Ed.) § 187; *Hoffman v. Mackall*, 64 Am. Dec. 641; Bump, Fraud. Conv. (4th Ed.) 22, 23; 2 Bigelow, Fraud, pp. 292, 293 and note; *Gardner v. Parmalee*, 31 Ohio St. 551.

The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application in this state, and the Code should be liberally construed with a view to effect its objects and to promote justice. Section 2987, Comp. Laws 1888.

We are of the opinion that the court erred in rejecting the evidence offered. The judgment of the court below is reversed, with costs, and a new trial granted.

ZANE, C. J., and BARTCH, J., concur.

MARTIN ENSIGN, JR., RESPONDENT, v. GEORGE W. FISHER, MARY F. FISHER AND LILLIE BLAND, APPELLANTS.

FRAUDULENT CONVEYANCE—NONSUIT—REVIEW ON APPEAL—SUSPICIOUS CIRCUMSTANCES.

1. The offer of evidence after the overruling of a motion for nonsuit is not a waiver of the exception taken to the order overruling such motion, under Sess. Laws 1894, p. 42.
2. Under section 9 of article 8 of the constitution, which provides that "appeals to this court shall be upon the record made in the court below, \* \* \* and that in equity cases the appeal may be on questions of both law and fact," *held*, that questions of both law and fact arising in equity cases can be reviewed in this court upon the record made in the court below, if properly brought to this court.
3. When there is testimony offered by the plaintiff, in his affirmative case, tending to establish a *prima facie* case of fraud in the alleged sale of property with intent to defraud creditors, a motion for nonsuit should be granted. Fraud cannot be presumed from mere suspicious circumstances, but must be proved. Testimony offered *held* insufficient to make a *prima facie* case.

(No. 760. Decided Feb. 9, 1897.)

Appeal from the First district court, Box Elder county.  
Hon. C. H. Hart, *Judge*.

Action by Martin Ensign, Jr., against George W. Fisher et al. to set aside a conveyance alleged to have been made to defraud creditors. From a judgment for plaintiff, defendants appeal. *Reversed*.

*Moyle, Zane & Costigan*, for appellant:

A preliminary question arises as to practice on equity appeals under our new constitution. This is an equity case, and the constitution has totally changed the former practice. Heretofore appeals in law cases and in equity cases upon findings were treated alike, as the case of *Wells v. Wells*, 7 Utah 68, and *Dooly Block v. Rapid Transit Co.*, 9 Utah 31, show. But the constitution has provided, art. 8, sec. 10, that the appeal shall be on the record below, and in law cases on questions of fact alone, but in equity cases on both questions of law and fact. This restores our equity practice to the old equity practice which is now in vogue in the United States courts, when the error assigned is that the decree and findings are erroneous, and the whole case comes up on the record just as it did in the trial court, and every question there made, both of law and fact, is open to review. *Ridings v. Johnson*, 128 U. S. 212, 218; *United States v. Old Settlers*, 148 U. S. 427; 2 Daniels Chan. Pr. 1459 and note, 1484 and note, 1489 and note (star paging).

Other states have this practice now. *Miller v. Cook*, 135 Ill. 190; *Belleville v. Citizens' Co.*, 152 Ill. 171; *Martin v. Estes*, (Mo.) 28 S. W. Rep. 65; *Likins v. Likins*, (Mo.) 27 S. W. Rep. 531; *Thompson v. Cohen*, 24 S. W. Rep. 1023.

And this holds true where evidence is orally taken. *Benne v. Schecko*, 13 S. W. Rep. 182; *Sayer v. Devore*, 13 S. W. Rep. 201.

Of course some weight is given to the findings, but the appellate court passes on the evidence without the findings having the binding force that they have under the Code, and the appellate court makes what it considers the proper decree.

*B. H. Jones*, for respondent.

PER CURIAM:

The plaintiff filed his complaint March 30, 1896, and alleged therein that on April 14, 1894, he filed his complaint, and obtained judgment thereon, against the defendant George W. Fisher, on February 26, 1896, in the district court for the county of Box Elder, for the sum of \$150.48, which judgment was then properly docketed; that on March 28, 1896, an execution was issued thereon, and returned unsatisfied; that on April 28, 1894, defendant George W. Fisher and Mary F. Fisher, his wife, made and delivered to their daughter Lillie Bland a deed of conveyance to the land in question. Plaintiff further alleged, on information and belief, that the said deed was so made for the use of the defendant George W. Fisher, without consideration, and with intent to hinder and defraud creditors of their lawful suits and damages, debts, and demands; that, since said deed was executed, the possession of said land had remained under the control and possession of defendant Fisher, under the fraudulent pretense that he was the agent of the grantee; that, at the time the conveyance was made, defendant Fisher was insolvent, and had no property in the state out of which an execution could be collected; and prayed that said conveyance be set aside as fraudulent. The defendant answered, denying the allegations in the complaint, and alleged that the conveyance was made in good faith, for a valuable consideration, without intent to hinder, delay, or defraud any creditor, and that he was not insolvent at the time of signing the conveyance. The plaintiff offered testimony tending to show that in December, 1894, defendant Mary F. Fisher offered to sell the lots in question; that in April, 1895, one witness



heard a conversation between Fisher and a gentleman to the effect that Fisher was going to trade the property; that Fisher had said he had sold the property, but the deed was not made out, and witness was to pay rent to the purchaser. It appears that this witness rented the house from Mr. Coombs, the agent of Lillie Bland, and paid him the rent some of the time, and at one time paid the rent to Fisher. Mr. Standing gave testimony tending to show that Mr. Coombs had spoken to him about buying the property in question in the fall of 1894; that Coombs had the property for sale, and that witness talked to Fisher and Coombs about buying it; that he went over and looked at the property; that Fisher said it was for sale at the sum of \$700. The deed to Lillie Bland was received in evidence. The record in the case of Rankin against Ensign and Fisher, showing a judgment against Fisher, of March 10, 1894, for \$100, and return of execution thereon, showing the judgment was fully paid and satisfied, was also offered in evidence. The record of the judgment set out in the complaint, upon which the plaintiff sought relief, was also introduced in evidence. After the introduction of this testimony, the plaintiff rested his case, and the defendant moved for a judgment of nonsuit, on the ground that no evidence had been introduced tending to show that the deed had been executed without a valuable consideration, or in trust, or that the possession of the property remained in the grantor, or that Fisher was insolvent at the time he made the deed or since, or that he was indebted at the time the deed was made, and that no material allegation of the complaint had been established. The court denied the motion, and the defendant excepted, assigning as error the refusal of the court to grant the nonsuit as requested.

Section 9 of article 8 of the constitution of Utah

provides "that appeals to this court shall be upon the record made in the court below. \* \* \* In equity cases the appeal may be on both questions of law and fact. \* \* \*" Under this section, questions of both law and fact arising in equity cases can be reviewed in this court upon the record made in the court below, and properly brought to this court.

The testimony offered was exceedingly meager and unsatisfactory. In order to establish a *prima facie* case as charged, the plaintiff should have shown that the conveyance of April 23, 1894, was without consideration and fraudulent, or that the deed was made in contemplation of insolvency, and that Fisher was insolvent at the time the deed was made and afterwards. No testimony was offered in plaintiff's affirmative case upon these subjects. The testimony that Fisher or his wife had offered to sell the property in the absence of Lillie Bland, during the year 1894 or 1895, taken in connection with the fact that Mr. Coombs was Lillie Bland's agent, and assisted in making the alleged negotiations for the sale, is not of itself sufficient to establish the charges made in the complaint. The fact that Fisher offered to sell the property would not show that Lillie Bland had not purchased the same in good faith, and for a valuable consideration. Fraud, when charged, must be proved. It cannot be presumed without proof. No judgment existed against Fisher at the time of the conveyance. The fact that suit had been commenced against him in a justice's court before the conveyance might be suspicious, but that fact alone should not be held sufficient evidence of fraud to annul a deed subsequently made, without some proof tending to show the fraudulent nature of the transfer.

The offer of evidence after the motion for a nonsuit was overruled is not a waiver of the exception taken to the

order overruling such motion, under Sess. Laws Utah 1894, p. 42. Testimony was afterwards introduced by both parties. Upon an examination of the testimony, we are not satisfied that it supports the findings and conclusions reached by the trial court. The judgment of the court below is set aside, with instructions to grant a judgment of nonsuit, as requested by the appellant.

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JOHNSON ET AL., RESPONDENTS, v. KATE TOOTLE  
ET AL., APPELLANTS.

MORTGAGES—SUBROGATION.

A purchaser of mortgaged premises, who agrees to pay the mortgage as a part consideration for the purchase price, upon the representations of the grantor that there are no judgments or liens standing against the grantor or the property, who pays the outstanding mortgage under a mistake of fact, relying upon such representations, and after the payment and discharge of the mortgage, and the execution of the conveyance to the grantee, it appears that there was a judgment standing against the grantor, which was recovered subsequent to the date of the mortgage, and it also appears that the position of the judgment creditor had in no way been changed or altered in any reliance upon the release of the mortgage,—*held*, that the grantee will be subrogated to the rights of the mortgagee, and may have the land sold first in satisfaction of the amount the grantee paid to satisfy the mortgage and costs, and the balance derived from the sale to be applied to the payment of the judgment. *Held*, also, that when the legal rights of the parties have been changed by mistake or

fraud, equity will restore them to their former condition, when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to either party.

(No. 761. Decided March 9, 1897.)

Appeal from the Fourth district court. Hon. W. M. McCarty, Judge.

Action by L. Johnson and others against Kate Tootle and others. From a judgment for plaintiffs defendants appeal. *Affirmed.*

*Booth, Lee & Gray*, for appellants.

"Payment by grantee who has assumed the entire mortgage debt completely extinguishes the mortgage; he cannot be subrogated to the rights of the mortgagee and keep the mortgage alive for any purpose." Vol. 3, Pomeroy Equity Jurisprudence, p. 192, sec. 1206 and note; *Winans v. Wilkie*, 41 Mich. 264; *Birke v. Abbott*, (Ind.) 1 N. E. Rep. 485; 1 Jones on Mortgages, sec. 743; *Bunn v. Lindsay*, (Mo.) 7 S. W. Rep. 473; *Shirk v. Whitten*, 131 Ind. 455; *Kellogg v. Colby*, 83 Iowa 513; *First Nat. Bank v. Thompson*, (Iowa) 34 N. W. 184; *Fort Dodge Bldg. & Loan Assn.*, (Iowa) 53 N. W. 283.

"He is thereby made the principal debtor, and the land is the primary fund for payment. If he pays off the mortgage, it is extinguished." Vol 2, Pomeroy Eq. Jur., sec. 797; *Russell v. Pistor et al.*, 7 N. Y. 171; *Lilly v. Palmer*, 51 Ill. 331; 24 Am. & Eng. Ency. of Law, 255 and notes on page 256; *Bunn v. Lindsay*, 7 S. W. 476; *Rubens v. Prindle*, 44 Barb. 345.

Payment by one primarily liable ordinarily extinguishes an incumbrance or debt so that no right to subro-

gation arises therefrom. *Abbott v. Kasson*, 72 Pa. St. 183; *Klippee v. Shields*, 90 Ind. 81; *Carlton v. Jackson*, 121 Mass. 592.

Cancellation of the record when the mortgage has been redeemed, paid, and discharged, is an absolute bar and discharge of the same in the absence of fraud, accident, or mistake. *Garwood v. Eldridge*, (N. J.) 34 Am. Dec. 195; *Liles v. Rogers* (N. C.) 37 Am. St. Rep. 627; *Goodyear v. Goodyear*, 72 Iowa 328; *Weidman v. Thompson*, 69 Iowa 36.

"The fact that a party is ignorant of a recorded judgment is due to his own negligence, against the consequences of which a court of equity cannot relieve him by interfering with the rights of others who are without fault." *Bunn v. Lindsay*, (Mo.) 7 S. W. Rep. 473; *Mather v. Jenswald*, 72 Iowa 550.

*Thurman & Wedgewood*, for respondents.

It appears from the agreed statement of facts in this case: That on the 23d day of December, 1890, Lorenzo Hatch was the owner of the real estate in Vernal, Uintah county, Utah, described in the plaintiff's complaint, which was subject to a lien of a certain trust deed made, executed and delivered by Lorenzo Hatch and wife, on July 29, 1890, to one Little, to secure the payment of \$3,000, with interest at 12 per cent per annum from date, to the Deseret Savings Bank, a corporation. That on December 23, 1890, defendants Tootle, Hosea & Co. recovered judgment against Lorenzo Hatch for the sum of \$820 and \$75.50 costs in the district court for the First judicial district at Provo, Utah, said district embracing Uintah county, which was situated many miles from Provo. That on May 23, 1891, the predecessors in interest of the plaintiff the Farmers' Co-operative Association

purchased a portion of the property described in the complaint from Lorenzo Hatch and wife, and agreed, in consideration for such purchase of said premises, and as a part of the purchase price, that said Farmers' Co-operative Association would pay the amount of said trust deed, and release and discharge Hatch from liability therein. That in pursuance of said agreement, and as a part of the consideration for the said premises, and as a part of the purchase price, the said amount due on said trust deed was paid to the Deseret Savings Bank, and the said bank thereafter caused a release and discharge of the said trust deed to be sent to and entered for record with the county recorder of Uintah county, where the premises are situated. That at the time of such purchase and contract made by plaintiffs and their predecessors in interest to which plaintiffs have succeeded in interest, said Hatch represented to said plaintiffs and their predecessors in interest that there were no judgments outstanding against him which were or might be liens upon said property, and no transcript of the judgment aforesaid or any judgment had ever been filed in the recorder's office of Uintah county, and, relying upon the representations of said Hatch that said premises were free and clear from all liens, judgments, and incumbrances, except said trust deed to the Deseret Savings Bank, and having no knowledge whatever to the contrary, the said predecessors in interest of the said plaintiffs purchased said property, and took a deed therefor October 7, 1891. It was further agreed and stipulated as facts in the case that the plaintiffs and their predecessors in interest by their acts had released from the lien of the trust deed all said lands described in plaintiff's complaint except that part conveyed by Hatch to plaintiffs and their predecessors by deed dated October 7, 1891, which land is the subject of

this litigation; that the balance of the land so released has been sold upon appellant's execution, but, outside of the exemption, did not satisfy said execution. It also appears from the testimony that a judgment docket kept in the First judicial district court, where such judgment was entered, contained the names of judgment debtors entered indiscriminately, without regard to any alphabetical order required by the statute. Execution was not issued upon the judgment until September, 1894. The court found the facts substantially as agreed upon. As a matter of law the court found the facts set forth constituted a fraud and mistake such as entitled the plaintiffs to equitable relief, and held, in consequence thereof, that plaintiffs should be subrogated to the rights of the Deseret Savings Bank in and to the trust deed paid by them, and that as such equitable mortgagees the plaintiffs were entitled to have that portion of the premises described in the complaint, and purchased by them, and levied upon by the defendants, sold under such trust deed, and the proceeds thereof applied—First, to the payment of the costs and expenses of this proceeding; second, to the payment of the sum of \$3,000, due the plaintiffs; and that the balance, if any, be applied to the satisfaction of the execution of Tootle, Hosea & Co. against Lorenzo Hatch,—and a decree was entered accordingly. From this judgment and decree this appeal is taken.

MINER, J. (after stating the facts):

It appears that when the appellants procured their judgment against Hatch the trust deed was a valid lien upon the property in question for upwards of \$3,000, and the judgment was subject to this lien. The respondents purchased the land in good faith, relying upon the repre-

sentations of Hatch that the trust deed was the only incumbrance upon it, and were in utter ignorance of the judgment. They purchased the land, and as a part of the purchase price paid off the trust deed for the benefit of the respondents, and not for the appellants. The position of the appellants in the meantime had in no way been changed. They did not take their judgment, part with any property, nor do any act in reliance upon the release of the trust deed. The respondents were not strangers, volunteers, or intermeddlers, within the rule which denies a remedy by way of subrogation. Under these circumstances, are the appellants in a position where they can take advantage of the mistake and fraud, and be placed in a better position because of it? If the lien of the trust deed is released for the benefit of respondents, the equities of both parties are preserved, and the appellants will have what they had when the judgment was obtained. The promise on the part of the respondents to pay the judgment was solely in consideration that they should obtain and acquire a clear title to the land purchased. As the consideration failed, the promise should not be enforced in equity in favor of appellants, when their position has been in no way changed because of the release of the trust deed. The general principle which runs through nearly all the cases of this character is that, "when the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new right acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons." To apply this principle in this case is to prevent manifest injustice and hardship, and its application will interfere with no superior intervening equities. In *Matzen v. Shaeffer*, 65 Cal. 81,



the facts are nearly identical with the facts in this case. In that case it appears that "a purchaser of land subject to a mortgage agreed with the owner and mortgagee to pay off the mortgage debt as part consideration for the purchase. The mortgage debt was paid by the purchaser, and the remainder of the purchase price to the owner, who thereupon conveyed the land to the purchaser. Satisfaction of the mortgage was entered on the record. It was held that the transaction operated as an equitable assignment of the mortgage to the purchaser, and was a lien paramount to that of a judgment entered after the mortgage and before the entry of satisfaction." In the case of *Barnes v. Mott*, 64 N. Y. 397, the court held in a similar case that: "So much of the judgment as restores the mortgage upon the premises now owned by the plaintiffs, paid off and satisfied by the devisees of Burr, the then owner, and reinstates the same as a lien upon the mortgaged premises, prior and paramount to the lien of the judgment recovered by Orchard and assigned to the defendant, is clearly right. Upon payment of the mortgage by the then owners of the premises, they were entitled to all the rights of the mortgagee, and to an assignment of the mortgage; and, having caused the same to be satisfied under circumstances authorizing an inference of a mistake of fact, equity will presume such mistake, and give the party the benefit of the equitable right of subrogation. To do so in this case is to prevent manifest injustice and hardship, and interferes with no superior intervening equities." This doctrine is sustained by the great weight of authority, although there are decisions to the contrary. *Barnes v. Camack*, 1 Barb. 392; *Pearce v. Buell*, 22 Or. 29; *Emmert v. Thompson*, (Minn.) 52 N. W. 31; *Gatewood v. Gatewood*, 75 Va. 407; *Young v. Morgan*, 89 Ill. 199; *Barnes v. Mott*, 64 N. Y. 397; *Smith*

v. *Dinsmoor*, 119 Ill. 656; *Bryson v. Meyers*, 1 Watts. & S. 120, 425; *Hudson v. Dismukes*, 77 Va. 242, 247; *Yaple v. Stephens*, (Kan. Sup.) 14 Pac. 222; 2 Warv. Vend. p. 858, and note 4; Harris, Subr. § 816; *Backer v. Pyne*, (Ind. Sup.) 30 N. E. 21.<sup>1</sup>/<sub>2</sub>

Under the facts in this case we are of the opinion that the respondents are within the rule that whenever it is equitable that a security should be kept alive for the benefit of one advancing money to pay it off, and new rights have not attached in dependence of the apparent discharge of the prior security, subrogation will be allowed. In arriving at this conclusion, we have given due weight to the able argument on the part of counsel for the appellants to the effect that one who assumes a debt becomes primarily responsible for it; that payment operates as a discharge, and that the securities cannot be kept alive for his benefit. But, under the facts in this case, we cannot subscribe to a proposition that would work such hardship and injustice as such a holding would impose upon innocent parties where no new rights have been created on the faith and strength of the altered condition of the legal rights. The judgment of the court below is affirmed, with costs. |

ZANE, C. J., and BARTCH, J., concur.

DAVID C. McLAUGHLIN, RESPONDENT, v. THOMAS  
F. MULLOY, APPELLANT.

CO-PARTNERSHIP — CONSTITUENT MEMBER — INTENT — POWER OF  
SINGLE PARTNER.

1. One firm may become a partner in another firm, and in that event such partner will be treated as a constituent member of the new firm.
2. K. & Bro., as a firm, became a constituent member of the firm of M., K. & Co., whose members then were M. and K. & Bro., each having an equal interest in the new firm. Both firms were engaged in the same line of business. The new firm manufactured and furnished lumber in which K. & Bro. as a firm were dealing. Profits made by M., K. & Co. inured to the use and benefit of K. & Bro. In transacting the business of M., K. & Co., debts were legitimately created. To pay these obligations, a loan was obtained by M., K. & Co., with the agreement that K. & Bro. and M. should sign the note to be given for the loan, as sureties for M., K. & Co. K., one of the members of K. & Bro., signed the firm name to the note as such surety. *Held*, that the firm of K. & Bro. was bound by such signature.
3. The acts of one partner in relation to the partnership business will bind the firm.

(No. 762. Decided March 10, 1897.)

Appeal from the Third district court, Summit county.  
Hon. M. L. Ritchie, *Judge*.

Action by David C. McLaughlin, receiver of the Park City Bank, against Thomas F. Mulloy. From a judgment for plaintiff, defendant appeals. *Affirmed*.

*S. McDowall*, for appellant.

The partner who signed the firm name without authority is *himself bound*, the same as if he had signed his own name." Bates on Partnership, sec. 349, and cases cited; *Hendrie v. Berkowitz*, 37 Cal. 113, cited in 3 Dill. 51; *Dowling v. Bank*, 145 U. S. 512; *Clive v. Morgan*, (Tex.) 28 S. W. Rep. 572; *Van Dyke v. Seelye*, (Minn.) 52 N. W. Rep. 215; see note 31 Am. State Rep. "by partners," pp. 754 to 756; *Slipp v. Hartley*, 36 Am. St. Rep. 629 and notes; *Presby v. Thomas*, 1 App. D. C. 171.

"When a firm name is used as a surety for a third person, the presumption is that such use of the firm name is outside of the firm business, and the *burden of proving assent, estoppel or ratification, is on the person asserting the liability of the partners who have not signed.*" *Fore v. Hittson*, (Tex.) 8 S. W. Rep. 292; *Foot v. Sabin*, 19 Johns. 155; *Hendrie v. Berkowitz*, 37 Cal. 113; *Platt v. Koehler*, (Iowa) 60 N. W. Rep. 178.

*Brown, Henderson & King*, for respondents.

This is an action in the nature of an equitable proceeding, brought by the plaintiff, representing the Park City Bank, as receiver, against the defendant, who is the assignee of the firm of Kidder & Bro., for money had and received to the plaintiff's use, as such receiver. The cause was tried before a referee, and, after submitting his report to the court, judgment was entered in favor of the plaintiff. The facts found, so far as material to this decision, are substantially as follows: On and prior to July 21, 1892, George C. Kidder and Russell W. Kidder were co-partners, engaged in the lumber business at Park City, Utah, under the firm name of Kidder & Bro. This firm continued doing business until June 13, 1893, when

it made an assignment to the defendant for the benefit of its creditors. On and prior to July 21, 1892, and thereafter until such assignment, Kidder & Bro. were co-partners with one H. P. Mason, and engaged in the business of manufacturing lumber in the state of California, under the firm name of Mason, Kidder & Co., and a large amount of their lumber was shipped to the firm of Kidder & Bro. In the new co-partnership, Kidder & Bro. constituted one partner, and Mason was the other, the two partners having equal interests therein. The co-partnership so formed, in the pursuit of its business, became indebted in California and elsewhere; and about July 21, 1892, for the purpose of paying these debts, it negotiated a loan of \$8,000, from the Park City Bank, it being understood and agreed that the note to be given for the loan should be signed by the individual members of the firm of Mason, Kidder & Co., as sureties for the firm. On July 21, 1892, the note was executed for \$8,000, and George C. Kidder, without the knowledge of Russell W. Kidder, in good faith, believing it to be for the best interests of the firm of Kidder & Bro., and that he had the legal right so to do, signed the name of Kidder & Bro. thereto, as surety for the firm of Mason, Kidder & Co., and Mason also executed the note as such surety. Five thousand dollars of the money obtained on this paper was paid on the debts of Mason, Kidder & Co., by its manager, George C. Kidder; and the remaining three thousand dollars was credited to the account of the firm of Mason, Kidder & Co. with the Park City Bank, and was drawn out from time to time, on the checks of that firm, in payment of its debts. On January 21, 1893, the note was renewed in precisely the same manner in which it was originally given. At the time of the assignment of Kidder & Bro., there was due on the note \$8,043.33, no

part of which has been paid. The defendant, as assignee of the firm of Kidder & Bro., has received sufficient assets to pay 20 per centum upon the liabilities, but refuses to pay anything on the plaintiff's claim.

BARTCH, J. (after stating the facts):

It seems to be conceded on both sides that this action is in the nature of a suit in equity, to determine the plaintiff's right to money in the hands of the defendant, and is controlled by the principles governing the distribution of partnership funds in case of insolvency. Nor is there any dispute that, when a co-partnership becomes insolvent, its creditors have a preference, in the payment of their claims, over creditors of individual members, and that, in case of insolvency, the creditors of individuals have preference over claims against the co-partnership.

The principal contention of the appellant appears to be that the firm of Kidder & Bro. was not bound by the action of George C. Kidder in signing the firm name on the note as surety, without the knowledge of the other member of the firm, because, as is insisted, such action was not within the scope of the co-partnership. No doubt one firm may become a partner in another firm, and in that event such partner will be treated as a constituent member of the new firm, and division of profits made to the constituent co-partnership, and not to its members, as individuals, unless the intention of the parties be otherwise. So, liabilities may attach to the constituent members of the new firm. *Bates, Partn.* § 150; *In re Hamilton*, 1 Fed. 800; *In re Gilbert*, (Wis.) 68 N. W. 863; *Bullock v. Hubbard*, 23 Cal. 496.

The firm of Kidder & Bro. having become a constituent member of the firm of Mason, Kidder & Co., which is conceded, it became a part of its business, and was to its

interest, as such co-partnership, to sustain and promote the business of Mason, Kidder & Co. Therefore anything which the firm of Kidder & Bro. did to that end was within the scope of its business, and could be done in the usual manner of transacting partnership business. As a co-partnership, Kidder & Bro. had embarked in the business of Mason, Kidder & Co., both firms being in the same line of business. The new firm manufactured and furnished lumber, in which Kidder & Bro., as a firm, were dealing. The purpose was to make profits for Mason, Kidder & Co., which would inure to the use and benefit of Kidder & Bro. In transacting the business of Mason, Kidder & Co., debts were legitimately created; and, to pay these obligations, the loan was obtained by the firm through George C. Kidder, from the Park City Bank, with the agreement that Kidder & Bro. and H. P. Mason should sign the note to be given for the loan, as sureties for Mason, Kidder & Co. Under all these circumstances, we are of the opinion that George C. Kidder had the lawful right, he being a member of the firm of Kidder & Bro., to sign the firm name on the note as surety, and that the firm of Kidder & Bro. was bound by such signature. *Turnpike Co. v. Gulick*, 16 N. J. Law, 161, 169; *Gulick v. Gulick*, 14 N. J. Law, 578.

It is also insisted that, regardless of whether the firm of Kidder & Bro. is liable on the note in question, the respondent has no cause of action against the assignee, until it shall appear that he has funds in his possession, belonging to the insolvent firm, after all its firm debts have been paid. The firm of Kidder & Bro. being bound by the execution of the note, the amount thereof remaining due and unpaid constitutes a valid claim against that firm, and must be regarded and treated by the assignee the same as any other firm debt, in the payment of per-

centage on the firm's liabilities. The cases on which the appellant relies for a reversal do not appear to be applicable to the facts of this case. We find no reversible error in the record. The judgment is affirmed.

ZANE, C. J., and MINER, J., concur.

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JOHN T. SNELSON, APPELLANT, *v.* FISHER S.  
HARRIS ET AL., RESPONDENTS.

ATTACHMENT OF JUDGMENT DEBTOR—PAYMENT TO SHERIFF.

Appellant obtained a judgment against defendants, whose indebtedness on the judgment thus obtained was attached by a judgment creditor of appellant, and paid by defendants to the sheriff. *Held*, that such attachment was valid under section 3315, Comp. Laws 1888, which authorized the payment of the amount to the sheriff serving the attachment.

(No. 766. Decided April 1, 1897.)

Appeal from the Third district court, Salt Lake county.  
Hon. M. L. Ritchie, *Judge*.

Action by John T. Snelson against Fisher S. Harris, administrator of Elbridge Tufts, and Jennie Tufts. Judgment for defendants. Plaintiff appeals. *Affirmed*.

*James A. Williams*, for appellant.

*Powers, Straup & Lippman*, for respondents.



ZANE, C. J.:

It appears from this record that the plaintiff recovered judgment against the late Elbridge Tufts, of which he was unable to obtain satisfaction; that, with a view to its collection, he filed a creditors' bill against Tufts and his wife, Jennie, to set aside certain deeds made by him to his wife, conveying certain real and personal property described; that, after the death of Tufts, the court, upon the trial of the case against the surviving defendant, and the administrator, Harris, found that there was due the plaintiff upon the judgment \$280, and made a decree, which, so far as it is necessary to state it, is as follows: "And that all of the said property, both real and personal, and said lease be, and the same is hereby, decreed to be the property of the estate of Elbridge Tufts, deceased, unless the defendant Jennie Tufts will pay to the plaintiff or his counsel the sum of \$280, within twenty days from the date hereof; upon payment of which, said transfers, assignment, and bill of sale shall be held good and valid, and the plaintiff shall satisfy judgment herein, and the judgment recorded against Elbridge Tufts in this court, upon which this suit was founded, and also the judgment recorded in this court against W. L. Pickard, Fritz Riepen, and L. P. Palmer. That the payment by Jennie Tufts, as aforesaid, of the said sum, shall be in satisfaction of this judgment, with costs of all proceedings and of this suit." This decree, in effect, found \$280 to be due the plaintiff, and provided that Jennie Tufts' property should be subjected to its payment, unless she should pay the amount to plaintiff within 20 days; and the decree authorized her to pay it to the plaintiff, and declared that such payment should satisfy the judgment, and that the conveyances sought to be set aside should be valid if such payment should be

made. This decree was a means adopted to compel the defendant Jennie Tufts to pay the judgment to the plaintiff; and the decree made it her duty to do so.

It further appears that Lizzie Snelson, the divorced wife of the plaintiff, had a decree against him for \$505; that an execution issued thereon was in the hands of the sheriff, and that the sheriff, in pursuance of section 3426, Comp. Laws Utah 1888, attached the \$280 which the defendant Tufts was required to pay to the plaintiff; that the defendant Tufts, upon service of the execution, made answer that she was indebted to the plaintiff in the sum of \$280, as evidenced by the findings and decree against her in his favor, and thereupon paid the same to the sheriff.

These facts present the question, did such payment to the sheriff for the judgment creditor of the plaintiff satisfy the decree? The ruling of the court below, holding that it did, the plaintiff assigns as error. The validity of the judgment against plaintiff is not questioned. The above-mentioned section declares that "debts and credits and all other property, both real and personal, \* \* \* may be attached on execution in like manner as on writs of attachment." And the attachment act (section 3315, Comp. Laws Utah 1888) provides that "all persons \* \* \* owing any debts to the defendant at the time of service upon them of a copy of the writ and notice \* \* \* shall be, unless \* \* \* such debts be paid to the officer, liable to the plaintiff for the amount of such \* \* \* debts." This section authorized the payment of the amount of the decree to the sheriff serving the attachment. The orders appealed from are affirmed.

BARTCH, J., and McCARTY, District Judge, concur.

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# INDEX.

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ADMISSION—See DENIALS.

APPEAL—See BOARD OF POLICE AND FIRE COMMISSIONERS; INDICTMENT; DENIAL; RES ADJUDICATA, 1.

1. In an action to restrain defendant from discharging certain waters upon the lands of plaintiff, the district court granted an injunction *pendente lite*. Defendant appealed from the order granting the injunction, and respondent moved to dismiss the appeal on the ground that it was not a final judgment, and therefore not warranted by the constitution. *Held*, that the terms, "in other cases the supreme court shall have appellate jurisdiction only," as used in section 4, art. 8, Const., has reference to appeals from all final judgments of the district court as used in section 9, art. 8, Const., and no other.

A final judgment is a judgment that disposes of the case as to all parties, and finally disposes of the subject-matter of the litigation on the merits of the case.

While there is no express declaration that appeals will not lie from judgments other than final judgments, yet the court holds that the affirmative declaration, as used in the section, that "from all final judgments of the district court there shall be a right of appeal to the supreme court," in connection with the language used as to other appeals, manifests the intent of the framers of the constitution to except from the appellate jurisdiction of the supreme court appeals from the district courts other than appeals from final judgments. This intention and interpretation is founded on the manifest intent of the framers of the constitution in framing section 9, and upon the general rules of construction.

The expression of one thing in the constitution or statute usually implies the necessary exclusion of things not expressed, and the people, in framing section 9, intended to deny the right of appeal to the supreme court in all other cases,

**APPEAL—Continued.**

although no express term of negation was used, and so much of subdivision 3, § 3635, Comp. Laws Utah 1888, authorizing appeals from orders granting an injunction, is abrogated and annulled by section 9, art. 8, Const.

The policy of the law of the several states and of the United States is to prevent unnecessary appeals. The interests of litigants require that appeals shall not prematurely be brought to the appellate court by piecemeal, and the litigants harassed by useless expense and delay of their rights. A party against whom an interlocutory order is made can have all his wrongs redressed and his rights protected by an appeal from a final judgment, where all the alleged errors may be reviewed at one hearing in the supreme court.

An appeal from an order *pendente lite* is not an appeal from a final judgment.

A citizen has no vested right in statutory provisions and exemptions. A statutory right to have cases reviewed on appeal may be taken away by a repeal of the statute, even as to cases which have been previously appealed. The constitution has taken away the right of appeal from an interlocutory order granting a temporary injunction. *North Point Irrig. Co. v. Canal Co.*, 155.

2. The plaintiff recovered judgment in an action of ejectment against defendant. The judgment, on motion for a new trial, was set aside and vacated, and a new trial granted. From the order setting aside and vacating the judgment, plaintiff appealed. Respondent moved to dismiss the appeal on the ground that the judgment not being final, it is not within the constitutional right of appeals. *Held*, affirming *North Point Consol. Irr. Co. v. Utah & S. L. Canal Co.*, 14 Utah 155, that, as the appeal was not from a final judgment of the district court, it is prohibited by implication under section 9, art. 8, Const., and by the application of the maxim, "*Inclusio unius est exclusio alterius*." The constitution has taken away the statutory right of appeal from the order vacating and setting aside the judgment appealed from. By using the terms, "from all final judgments of the district courts, there shall be a right of appeal to the supreme court," in connection with the balance of the section, the framers of that instrument intended to deny the right of appeal to the supreme court in all other

## APPEAL—Continued.

cases arising under that clause, although no express term of negation was used.

The policy of the laws of the several states and of the United States is to prevent unnecessary appeals. Interests of litigants require that cases shall not be prematurely brought to the higher court, nor by piecemeal, and litigants harassed by useless delay and expense, and the courts burdened with unnecessary labor.

A citizen has no vested right in the statutory privilege or exemptions. A statutory right to have any particular question reviewed on appeal may be taken away by a repeal of the statute. *Eastman v. Gurrey*, 169.

8. An insurance company, sued upon a policy which it had given, admitted liability, but alleged that two persons made conflicting claims, to the amount due, and the court, upon a hearing, required them to interplead, and upon a deposit of the amount with the clerk made an order discharging the company from further liability. *Held*, that the order was final as to the company, and therefore appealable.

An appeal from an order made upon a hearing discharging the defendant, not having been taken within 60 days after notice of it, authorizes the presumption that such facts were proven, as without which the decision could not have been made, as the evidence in the bill of exceptions cannot be considered.

A motion to vacate a final judgment comes too late after the term has expired, and after the time within which a motion for a new trial can be made, and it should be denied. *Jones v. New York Life Ins. Co*, 215.

4 Section 9, art. 8, of the constitution of Utah, provides that "in equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone." *Held* that, when the testimony presents a question of fact, and the court finds the facts against one of the parties, such findings will not be disturbed by the supreme court if there is evidence to support the finding. *Walley v. Deseret Nat. Bank*, 805.

5. "Where a case is tried in a court sitting as a court of chancery, and the evidence is conflicting, the findings of fact will be conclusive in the appellate court, unless they are so manifestly against the weight of evidence as to demonstrate

## APPEAL—Continued.

some oversight or mistake. So, likewise, where the case is tried before a referee, and his findings are confirmed by the court below. *Dwyer v. Salt Lake City Mfg. Co.*, 339.

6. Appeals lie from the district courts of the late territory of Utah, when the decisions of such courts are rendered in cases appealed from the justices' courts, even when such appeals are perfected after statehood. In such cases the laws of the territory regulating appeals control, and not the following clause of article 8 of section 9 of the constitution: "Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the district courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the district courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute." The district court referred to in this section is the district court of the state, and not that of the territory. *Holson v. U. P. Ry. Co.*, 381.
7. While the ninth section of article 8 of the state constitution declares, "In cases at law the appeal shall be on questions of law alone," this court will examine the evidence to which the ruling was applied so far as necessary to determine whether such ruling was right or wrong. *Johnston v. Meagher*, 426.
8. Under section 9 of article 8 of the constitution, which provides that appeals to this court shall be upon the record made in the court below, "\* \* \* and that in equity cases, the appeal may be on questions of both law and fact," held, that questions of both law and fact arising in equity cases can be reviewed in this court upon the record made in the court below, if properly brought to this court. *Petrovitzky v. Brigham*, 472; *Ensign v. Fisher*, 477.

## APPOINTMENT.

The first term of district judges commenced in January, 1896, and extends until January, 1901, and the plaintiff was appointed in June of the first-named year to fill a vacancy in the office. Held, that his term expired upon the qualification of his successor, elected in November, 1896, under a law pro-

**APPOINTMENT—Continued.**

viding therefor, passed in pursuance of section 10 of article 7 of the constitution, which declares that, if the office of district judge becomes vacant, it shall be the duty of the governor to fill the same, and the appointee shall hold until his successor shall be duly elected and qualified as may be provided by law. *Ritchie v. Richards*, 845.

**ASSAULT—See INDICTMENT.****ASSIGNMENT OF CLAIMS—See MECHANIC'S LIEN, 2.****ATTACHMENT.**

Appellant obtained a judgment against defendants, whose indebtedness on the judgment thus obtained was attached by a judgment creditor of appellant, and paid by defendants to the sheriff. *Held*, that such attachment was valid under section 3315, Comp. Laws 1888, which authorized the payment of the amount to the sheriff serving the attachment. *Snelson v. Harris*, 495.

**BALLOTS.**

A law providing that electors may vote for all the candidates of a party by making a cross opposite a party emblem, and requiring those who do not vote for all such candidates to make a cross opposite the name of those voted for, and requiring those who have not been nominated by a party to present a petition to an officer mentioned, signed by a number of electors, in order to have their names printed on the ticket, *held* to be valid.

No legal voter in this state can be compelled to disclose for whom he voted, or to have his ballot so marked that it may be ascertained therefrom how he voted; and any contrivance or method by which the ballot can be identified, and the voter exposed, is unauthorized, and no legislative enactment can give it the force of law. Per BARTCH, J. MINER, J., concurring.

So much of section 26 of the act approved March 28, 1896 (Sess. Laws, p. 183), entitled "An act in relation to elections," etc., as provides for the identification of the ballot by numbering it, is void; such provision being in conflict with section 8, art. 4; of the constitution, which provides that "all elec-



**BALLOTS—Continued.**

tions shall be by secret ballot," etc. Per BARTCH, J. MINER, J., concurring. ZANE, C. J. dissenting.

The constitution secures to the voter impenetrable secrecy. Per BARTCH, J. MINER, J., concurring. ZANE, C. J., *held* legal secrecy sufficient. *Ritchie v. Richards*, 345.

**BILLS AND NOTES—See PARTNERSHIP.**

1. Plaintiff brought his action upon a promissory note. The defendant set up an affirmative defense, and offered to prove that, although he had signed the note as principal, he was in fact only a surety; that at or shortly after maturity, without the knowledge or consent of defendant, the plaintiff extended the time of payment; and that plaintiff knew, at the time the payment was extended, that defendant was only a surety. *Held*, that the defense was proper, and the evidence offered admissible.

Where the payee of a promissory note, after having knowledge of the relation of suretyship existing between the joint makers, enters into a new agreement with the principal debtor to extend the time of payment, or do any act to continue the liability of the surety, without his consent, the surety is discharged.

Where a person signs a note as maker, but is in fact a surety, and there is nothing on the face of the note to show his true relation, he will be treated and considered as a principal with respect to all who have no notice of the suretyship; but, whenever it is material in his defense to an action against him on the note, he may offer and prove by parol evidence that he made the note merely as surety, without consideration, and that such fact was known to the plaintiff before the equities through which such evidence became admissible arose. *Gillett v. Taylor*, 190.

2. The payment of interest in advance, on a note, by the principal to a creditor, is of itself, without more, sufficient *prima facie* evidence of an agreement to extend the time of payment for the period for which the interest is paid. The payment in advance presupposes that delay of payment of the principal is to be given for that time. The consideration for an agreement for delay in payment is implied from the transaction, if not sufficiently expressed. But this presumption may be over-

## BILLS AND NOTES—Continued.

come by evidence of a refusal to extend, demand for payment, or any other evidence showing that delay or extension was not agreed upon. *Walley v. Deseret Nat. Bank*, 305.

8. One or more persons may sign a note as guarantors, and deliver it to the payee, with the agreement that they shall not be bound unless other persons named shall also sign, and, if such other persons do not sign, that those signing shall not be held.

It was not error in the court to instruct the jury that no agreement between the directors with respect to the contract of guaranty, of which plaintiff was not clearly notified, could bind it.

It being conceded that the note sued on was signed by the president and secretary of the defendant corporation and the other defendants, and that it had been turned over to plaintiff, it was not error in the court to charge the jury that the law presumes the note was executed and delivered, if in the same charge the jury were told that the plaintiff had the right to waive the guaranty of any director who did not sign the contract; that by accepting the note without the guaranty of some of the directors, the bank did not thereby release those who did sign, unless the jury should find that the plaintiff had actual notice that those signing did so with a condition that all the directors should sign, and, if they did not, none of those signing should be liable. *Bank v. Burton-Gardner Co.*, 420.

4. R. was president of the defendant, and vice-president and manager of the bank for which plaintiff was receiver, and W. was at the same time secretary for both companies, when the note sued upon was given by the defendant company, and signed: "Cache Valley Canal Co., Theo. Robison, Pres. R. H. Whipple, Sec." It appears that the note in question was given for another note, and interest on the latter, which was signed and guarantied by R. and W., and that, when the exchange was made, collateral security in bonds was given in the place of the guaranty, but that, four or five days later, defendants R. and W., without any consideration, guarantied the note. *Held*, that R., as manager of the bank, might substitute the note sued on, and the collateral security thereon, for the former note and guaranty, without the consent of the directors,

**BILLS AND NOTES—Continued.**

if he had habitually exercised such authority to the knowledge of the board, and without objection, as the board would be estopped from denying the authority of the manager; and, since the transaction was conducted by officers of the bank, the presumption is that they knew the extent of their authority. The second guaranty, being signed five days after the new note and collaterals were given, on the ground merely that the bank might wish to negotiate the second note, is not binding, since there was no consideration to support it.

The agreement of R. and W. to substitute the new note and collaterals for the old note and guaranty, by which they would discharge themselves, being officers of both corporations, was voidable only; and, to render the agreement void by returning the stock given as collateral, it must appear that all of the stock of any value was returned, or tender of all made.

Plaintiff cannot retain the bonds and the new note, and rely upon it in the action. A part of the transaction cannot be ratified and the rest repudiated.

Where the signers of a promissory note place the words, "President" and "Secretary" after their names, having first signed the corporate name, such words will not be considered mere surplusage, and the note will not be regarded as a joint note if the circumstances unmistakably indicate an intention not to sign the note as joint makers.

It is competent for plaintiff to offer in evidence a paper in which he has acknowledged the receipt of bonds and stocks constituting collateral security on the note sued on, when the purpose of such evidence is to contradict the testimony that the bonds were given in part to secure a second note, and in lieu of a guaranty signed by defendants R. and W. *Armstrong v. Cache Valley Canal Co.*, 450.

**BOARD OF POLICE AND FIRE COMMISSIONERS.**

The plaintiff and respondent was sergeant in the police force of Salt Lake City, and was dismissed by the defendant, as chief of police, for a violation of the rules promulgated by said chief and for insubordination. A report of said dismissal was duly made to the board of police and fire commissioners,

**BOARD OF POLICE AND FIRE COMMISSIONERS.—Continued.**

who affirmed the action of the chief by a refusal to reinstate the plaintiff. The defendant had promulgated rules for the regulation of his department, under authority conferred upon him by section 10 of the Session Laws of 1898 (page 223). The board did not adopt rules which the said section 10 conferred the power upon them to adopt, but were equally divided as to what, if any, rules should be adopted. *Held* that, in the absence of any rules, promulgated by the board, to limit the authority of the chief of police to make rules, the latter was authorized to make and enforce the regulations which the law empowered him to make; that in the following clauses of section 10: "It shall be their [the chief of police and chief engineer] duty to make and enforce rules and regulations to secure discipline in their respective departments. They shall have power, under such rules as the board may establish, to suspend without pay, fine not to exceed ten dollars, or dismiss any subordinate,"—the word "under" means "subject to"; and that the intention of the legislature was to grant the power to the chiefs to suspend, etc., but to give the board the authority to limit or qualify the power, and, since the board had failed to exercise this power under the authority of the law, the regulations of the chief must prevail, and the duty of seeing that the employes faithfully discharged their duties, as he was required to do under section 8 of the same law (page 223), justified him, subject to the approval of the board by a failure to reinstate, in the dismissal of the plaintiff. This construction is reinforced by the use of the word "may," a word here used undoubtedly in a primary or permissive sense.

The right of appeal is guaranteed under section 3634, Comp. Laws 1888. *Eslinger v. Pratt*, 107.

**BONDS TO KEEP THE PEACE.**

A person who attempts unlawfully to enter upon land in the lawful possession of another cannot require such person in possession to give a bond to keep the peace, because he resists and threatens to shoot if such unlawful attempt is persisted in. Sections 4796, 4798, 2 Comp. Laws Utah 1888, do not apply to threats upon such conditions. Peace warrants, and bonds to keep the peace, are not designed to protect men in doing unlawful acts against others, or

**BONDS TO KEEP THE PEACE—Continued.**

against their property. Their purpose is to secure observance of law, not to encourage its violation.

Actual possession is *prima facie* evidence of title in fee simple. Mere occupancy of land, however recent, is sufficient evidence of title against any one who cannot show a better claim, and is sufficient to enable him to maintain an action against a stranger.

A person in the lawful possession of land has a legal right to prevent an unlawful entry, by any degree of force necessary, short of taking human life.

Judgments of magistrates against defendants in prosecutions to bind persons to keep the peace, and in preliminary examinations, are not conclusive. They simply furnish a *prima facie* presumption of probable cause. *Johnston v. Meagher*, 426.

**BURDEN OF PROOF.**

Where, in an action upon an account, the defendant, in his answer, sets up affirmative matter upon which he relies to release himself from the plaintiff's claim, the burden is upon him to establish his defense; and in such case it is error for the court to charge the jury that the burden of proof is upon the plaintiff, without stating to them the position which the defendant occupies respecting the proof. *Stevens v. Stephens*, 255.

BY-LAWS—See PLEADING, 2.

CHARGE TO JURY—See SIDEWALKS.

CHIEF OF POLICE—See BOARD OF POLICE AND FIRE COMMISSIONERS.

**CIRCUMSTANTIAL EVIDENCE.**

The fact that the testimony in a criminal case is largely of a circumstantial character does not necessarily weaken its strength, if the circumstances are closely clustered together in one unbroken chain of criminating facts, all pointing with unerring certainty to the accused as the author of the alleged crime. Circumstantial evidence may be quite as conclusive as direct evidence, but it is incumbent upon the prosecution, not only to show by a preponderance of the evidence that the alleged facts and circumstances completing the chain are true,

## CIRCUMSTANTIAL EVIDENCE—Continued.

but they must also be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the defendant's guilt. The chain of circumstances must be complete and unbroken, and should be established beyond a reasonable doubt.

When characterizing the act of the defendant in killing the deceased, it was proper for the jury to view it in the light of all the circumstances to which it was subject at the time. It was proper for the jury to consider the condition of the weather; the ice upon the lake in February, and its absence in April; the size of the bullet, and the direction from which it was shot; whether the bodies were placed under the ice, and how they came to be found upon the shore of the lake; the defendant's efforts to prevent search in the places where the bodies were found, and his condition of mind and manner when viewing the bodies; what he said and did indicating a malicious intent, or the absence of it.

It was not error in the counsel for the prosecution, in his opening statement to the jury, to inform them that he expected to show the killing of two other young men besides the one with whose murder the prisoner was charged, and that all three met their death at the same time, at the hands of the defendant. While the general rule is that one crime cannot be offered to prove a similar offense committed against another person at another time, yet where the circumstances tend to show the killing of three persons in a similar manner, and at the same time, and their disappearance at the same time, as one continuing transaction, and the state was reasonably bound to account for the whereabouts of the two persons, companions of the deceased (whose death was not charged to defendant), then in such a case the killing of the one, and the manner and killing of each, bore upon the killing of the others, and tended to explain the motive, acts, and intent of the slayer of the deceased. Such evidence is competent, especially when accompanied by instructions from the court that the jury should not consider it except and so far as it tended to connect the defendant with the crime charged.

Where there is evidence sufficient to establish the defendant's

## CIRCUMSTANTIAL EVIDENCE—Continued.

guilt, it is for the jury to pass upon its weight, and determine whether or not the defendant is guilty beyond a reasonable doubt. *State v. Hayes*, 118.

## COMPLAINT—See CORPORATIONS.

1. This was a suit in intervention to determine certain rights to the water conducted from the Sanpitch river, through interveners' ditch, onto lands which came into the "rightful possession" of said interveners. To the complaint in intervention, defendants filed a demurrer, alleging that it was not shown by the complaint whether said lands claimed to be owned by interveners are owned or possessed in common or severalty by intervener or those he represents, nor who the parties are that claim the waters, nor their individual interest therein. *Held*, that where a complaint avers that the intervener and those he represents own an undivided interest in the said ditch in common, and that they came into the rightful possession of the lands watered by said ditch, and known as the "Ephraim North Meadows," and where it appears from the complaint that the intervener and those whom he represents have a common or general interest in the question involved in the action, and either gain or lose by the direct operation and effect of the judgment, and that the number of persons who would be joined as interveners is so large that it would be impracticable to bring them before the court, the complaint, although not containing the unerring certainty that is desirable, will be sufficient to give the interveners a standing in the court, under sections 3184 and 3190, Comp. Laws Utah 1888. *West Point Irrig. Co. v. Ditch Co.*, 127.
  2. Under our system, in a suit upon a written contract, it makes no difference whether a contract is set out in *hæc verba*, or whether it is annexed, and by proper reference made a part of the pleading. However, matters of substance, which are preliminary or collateral to the instrument, must be properly averred so that the ultimate facts for which it was incorporated will be clearly and distinctly presented; and if the instrument should be defective or ambiguous, it is incumbent upon the pleader to place upon it some construction by proper allegation, or else a demurrer will lie.
- This action was brought to recover upon a fire insurance policy.

## COMPLAINT—Continued.

The complaint contains an allegation to the effect that between the 15th and 25th of December, 1895, the plaintiff furnished proof of loss. The dates mentioned in this allegation were within the time required by the terms of the policy to furnish such proof, the fire having occurred on the 15th of December, 1895. *Held*, that the allegation was sufficient for the purposes of a general demurrer. MINER, J., dissenting, *Stephens v. Am. Fire Ins. Co.*, 265.

## CONSIDERATION—See BILLS AND NOTES.

CONSTITUTIONAL LAW—See EIGHT-HOUR LAW; APPEAL; JURY; BALLOT; LEGISLATIVE JOURNALS; COUNTY SCHOOL TAXES; LIMITATIONS UPON THE LEGISLATURE.

## CONTINUOUS POSSESSION—See SALES.

## CONTRACT—See MINES.

H. subscribed for 17 shares of stock in the North American Savings, Loan & Building Company, a corporation existing under the laws of the state of Minnesota, and doing business in this state. Under his contract and the by-laws of the company, he was to pay \$10.20 dues on the shares each month, until such monthly payments, together with the profits arising from interest on loans, premiums, and other sources, apportioned to the shares, would amount to \$100 per share, or in the aggregate to \$1,700. On these 17 shares H. procured from the corporation a loan of \$850, and evidenced the same by a promissory note which he secured by mortgage upon certain real property. At the same time he transferred to the corporation, absolutely,  $8\frac{1}{2}$  shares of his stock, as premium for the loan, and, as further security, assigned to it the other  $8\frac{1}{2}$  shares. By this contract he was to pay interest monthly on the sum loaned at the rate of six per cent. per annum, and continue to pay the dues and interest until the stock matured and was worth \$100 per share, when it was to be received by the corporation in satisfaction of the loan. Afterwards H. sold the mortgaged property to S., who took the same subject to the mortgage, and assumed and agreed to pay the indebtedness secured thereby in the manner therein



**CONTRACT—Continued.**

provided. When S. purchased the property he had no knowledge of the effect of the provisions of the mortgage, was not aware of the absolute assignment of the  $8\frac{1}{2}$  shares of the stock, had no interest in the stock, and was not a member of the corporation. The interest and dues were paid until a time when the dues paid aggregated \$367.20. S. then notified the corporation, in accordance with its by-laws, of his intention to pay the loan, and, claiming the right to apply the amount of the dues paid in reduction of the mortgage indebtedness, tendered it the sum of \$500, as the balance due. The corporation claimed that only one-half of the amount of such dues could be so applied, because of the absolute assignment of one-half the stock, and refused to accept the tender. S. thereupon brought this action to cancel the mortgage. *Held*, that the \$367.20 paid as dues on the stock must be applied in reduction of the debt.

Quære: Whether such contract as H. entered into, although valid under the laws of Minnesota, could be enforced under the laws of this state, as between a member and the corporation; this question not being decided. *Sautelle v. North Am. Savings Co.*, 443.

**CONTRIBUTORY NEGLIGENCE.**

A miner cannot recover damages from his employer for an injury in consequence of a defective car track, which it was his duty to repair, in a room in which he was working.

Nor can he recover damages for an injury in consequence of a defect in a track in his room, which it was his duty to report to the manager of the mine, or other person over him, when he did not report. *Butte v. Pleasant Valley Coal Co.*, 282.

**CONVERSION.**

In an action in trover, for the conversion of promissory notes on December 16, 1893, wherein defendant was confined in his proof of the value of the notes at a date prior to the alleged date of conversion, the plaintiff, in his rebutting case, introduced testimony, under objection, that defendant sold the judgment obtained upon the notes, after the alleged conversion, demand, and refusal, and after commencement of suit, in January, 1894, for their face value. *Held*, that the owner

## CONVERSION—Continued.

is *prima facie* entitled to recover their face value,—that is, their presumptive value,—and he will be entitled to recover their actual value, if shown. But the defendant has the right to show, in reduction of damages, the payment in whole or in part, the inability of the maker to pay, a release, invalidity of the instrument, or any other matter, which would legitimately affect or diminish their value, and that the proper measure of damages is the cash value of such notes at the time of the conversion, with interest to the time of trial. *Held*, further, that the fact that the purchaser of the notes sold the judgment which he had obtained upon them six months after the actual conversion, and after the commencement of the action, for its face value, would not take the case out of the rule, and that it was error to admit such testimony, especially as the undisputed facts show that a wrongful conversion of the notes occurred on June 16, 1893, more than six months before the sale of the judgment, at a time when the defendant traded the notes for bank stock in violation of the condition of the contract, which provided that the notes should be sold at public or private sale in case of default in payment of the principal note, for which payment the notes in question were pledged. Neglect and refusal of a maker to pay his note at maturity tends to show his inability to pay, and affects the value of his note. A proper return of an execution *nulla bona*, issued upon a valid judgment rendered against the maker of a note, is *prima facie* evidence of insolvency of the maker.

When promissory notes were given in pledge to secure payment of plaintiff's note at maturity, with a right to sell the pledged notes on default of payment, at public or private sale, without notice, and it appears that, before the principal note became due, the pledgee traded the pledged notes for bank stock, *held*, that this amounted to a wrongful conversion of the notes at the time the trade was made.

The refusal to surrender possession in response to a demand, is not, of itself, a conversion. It is only evidence of a conversion, and, like other inconclusive acts, is open to explanation. A special finding that certain notes had no market value at a given time, when all the testimony given tended to show the notes had a market value of a specified amount at that time, is not supported by the evidence.

## CONVERSION—Continued.

A general finding that the notes in question were worth their face value on a given date, and a special finding that such notes had no market value on that date, when the testimony supports the latter finding, renders the finding objectionable. Facts of an equivocal import cannot well be reduced to a certainty by conjecture. A finding should afford the means of its own interpretation, and for fixing its own sense, and should be sufficiently distinct and definite to enable the court to decide upon the judgment.

When promissory notes have a market value, it is competent to show what the cash market value was at the time of the conversion, as bearing upon and tending to fix their actual value. This rule applies to promissory notes and choses in action having a market value, the same as to other personal property. *Walley v. Deseret Nat. Bank*, 305.

## CORPORATIONS.

When the same persons, officers of several corporations, form a fraudulent design to use the property and credit of such corporations for their own advantage, to the injury of the other stockholders, and do fraudulent acts in carrying out such design, all the parties affected by such acts are proper parties to a complaint based upon such fraudulent design. The persons perpetrating the fraud, and all others whose gains or losses are traceable thereto, are proper parties to an action based upon fraud.

When a fraudulent conspiracy is the common point of litigation, the conspirators and all persons affected by the fraud are proper parties to a suit based upon it.

When the business of corporations is mismanaged, and their property is misappropriated by their officers, and such mismanagement and misappropriation is likely to continue, courts of equity will appoint receivers for them. *Stevens v. South Ogden Land Co.*, 232.

COUNTY CLERK—See FEES, 2.

## COUNTY SCHOOL TAX.

The proper construction of section 6, art. 10, of the constitution of the state of Utah, which provides that "in cities of the first and second class, the public school system shall be maintained

## COUNTY SCHOOL TAX—Continued.

and controlled by the board of education of such cities separate and apart from the counties in which said cities are located," is that in cities of the first and second class the public school system shall be maintained by the board of education of such cities. The board of education of such cities shall bear the expenses of, keep up, supply what is needed, maintain, and control the public school system therein; and such system of public schools shall be so maintained and controlled separate and apart from the counties in which said cities are located. The intention of the framers of this section was to locate and fix geographical divisions in counties containing cities of the first and second class, and make it the duty of the board of education of such cities to support, bear the necessary expense of, maintain, and control the public school system therein, separate and apart from the control of the counties in which such cities are located. The maintenance and control of public schools in said cities are made independent, separate, and apart from the counties in which they are located, and are to be controlled by the board of education of such cities separate and apart from the control of the county commissioners.

The collection of the county school tax within Salt Lake City, and the subtraction of about \$30,000 from such fund so raised for various county school purposes, before the fund is distributed according to the number of children of school age, under the several acts of the state legislature, is an evasion and violation of section 6, art. 10, of the state constitution; and certain provisions added to section 83, art. 10, p. 489, Sess. Laws 1896, and section 115, art. 15, p. 497, Sess. Laws 1896, and other like provisions, are *held* invalid and repugnant to section 6, art. 10, of the constitution. *Merrill v. Spencer*, 273.

## CROSS COMPLAINT.

Where, in the prayer of the complaint, the plaintiff asks that the defendants might be required to set forth their alleged adverse claim, and that the court might decree it to be null and void, and the defendants set up the agreement, and the facts upon which they base their rights to the water, and pray that their rights as shown by the allegation in their answer may be decreed to them, the court may grant to defendants an affirmative decree without a cross complaint having been filed. *Irrig. Co. v. Little*, 42.

**CROSS EXAMINATION.**

After a witness has been examined in chief, and given testimony tending to show his solvency at a given time, it is error to refuse the opposite party the right, on cross-examination, to show, by the witness, that at a certain time, during the period referred to, he had stated, to a certain person named, that he had no property his creditors could reach, and it would do no good to sue him. Such testimony would affect the credit of the witness, and tend to contradict and qualify his testimony in chief, and was also proper, laying the foundation for impeachment. *Walley v. Deseret Nat. Bank*, 305.

**DAMAGES—See CONVERSION; RES ADJUDICATA, 2.**

1. Where it is clear, almost beyond reasonable controversy, that the instructions of the court to the jury respecting the question of damages have been disregarded, the supreme court may order a new trial. The same influences which caused the jury to disregard the instructions of the court may have misled them in passing upon other questions in the case. *Wright v. So. Pac. Co.*, 383.
2. Appellant, owning land in Colorado, which had been examined by respondent, entered into a written contract with respondent to exchange the Colorado land, at a price named in the contract, for Ogden land, which respondent represented to be of a certain value, yielding certain fixed rentals, and located high and dry, in a specified locality. Appellant had not examined all the Ogden land, and the price of it was not stated in the contract of sale, but was in the deed. The Ogden property was not as represented, did not yield one-half the rent as represented, and was not worth one-third of the price represented. On the trial of the action brought by appellant to recover damages for fraud and deceit on the part of respondent in procuring the exchange, and where the respondent alleged no fraud on the part of appellant, the respondent, by his attorney, in his opening statement to the jury, under an offer incorporated in the answer, was allowed, under objection, to state to the jury that respondent offered then and there to sell and convey the Colorado property back to appellant for the sum of \$15,000, whereas appellant was claiming damages at \$85,000, and in open court tendered a deed for the sum from respondent's grantee on payment of \$15,000, and offered to give time on stated payments. *Held*, that the court erred in allowing

**DAMAGES—Continued.**

the offer to stand; that this was not a method recognized by law for proving value. The right of damages in such a case is absolute upon the happening of the wrong, and nothing but the act of the injured party could release it. The offer made doubtless operated to the disadvantage of the appellant. *Held*, further, that under the pleadings the value of the Colorado property, concerning which no fraud or deceit is alleged, was not in issue, so far as affecting the question of damages; that the appellant was entitled to the benefit of his bargain, and it was not for the jury to fix a new price on the appellant's land, when the same had already, without deception, been fixed by the parties.

Where the court instructed the jury that there was no evidence in the case as to what appellant did pay for the land in question, and that he was only entitled to recover what he paid, and further instructed the jury to disregard the testimony of appellant with reference to respondent's representations as to the rentals of certain pieces of land taken in exchange by appellant, which had a tendency to affect the value of the land, whereas the written contract and testimony did show that the price paid by appellant for such property was 8,250 acres of land at an agreed price of \$30 per acre, *held*, that the instruction was erroneous, and that the proper measure of damages in such a case is the difference between the actual value of the land purchased by appellant as it would have been if as represented and as it actually was. *Hecht v. Metzler*, 408.

**DECLARATIONS—See EVIDENCE, 5.**

**DECREE.**

1. A final decree upon the hearing of a cause on its merits cannot be amended or set aside on a motion made after the term has ended, and after the time has expired within which a motion for a new trial as fixed by the statute has passed. After that, such a decree can only be opened upon a bill of review, or upon an original complaint for fraud. But this rule does not apply to avoid decrees or clerical errors.
2. A decree entered after a trial on the merits of the case cannot be opened, set aside, or changed upon a motion, entered after the term, and after the time fixed by the statute for the entry

**DECREE—Continued.**

of such motion. An order made upon such a motion is void, and this rule also applies to that part of the decree relating to costs.

8. A refusal of the court to change the venue, upon a motion to set aside a void order, made after final decree in a case, is not reversible error. *Benson v. Anderson*, 334.

**DELIVERY—See SALES.****DEMURRER.**

Where plaintiff demurs and puts in an answer to a cross complaint, and it does not appear from the record that the court passed upon the demurrer, the error is not reversible. *Darke v. Smith*, 35.

**DENIAL.**

Where the legal representatives of a deceased person in their complaint allege that they are suing under the authority of the will of the deceased, which was probated in a court of record, and all necessary steps taken to enable them to sue, and in the answer the allegations are denied only on information and belief, the denial is not sufficiently specific as to the facts set up. In such case it may be assumed that the facts were admitted, and in such event no evidence of their existence is necessary. *Thompson v. Skeen*, 209.

**DEVISEE—See WITNESS, 1.****DUE PROCESS OF LAW—See EIGHT-HOUR LAW; JURY.****EASEMENT.**

An easement or servitude in land can only be acquired by the consent or acquiescence of the owner. *McGregor v. Mining Co.*, 47.

**EIGHT JURORS—See JURORS.****EIGHT-HOUR LAW.**

Plaintiff, in violation of a state law, employed one H. to labor in a mine more than eight hours per day. Upon fine and imprisonment, plaintiff petitioned the supreme court for a writ of *habeas corpus*, contending that the law limiting the time of labor in mines to eight hours a day was unconstitutional.

**EIGHT-HOUR LAW—Continued.**

tional. Section 1, p. 219, Laws 1896, declares that "the period of employment of working men in all underground mines shall be eight hours per day, except in cases of emergency, where life or property is in imminent danger." The constitution having declared that "the legislature shall pass laws providing for the health and safety of employes in factories, smelters and mines," the court will not hold the act without such constitutional authority if there is any reasonable doubt that it is not calculated to promote the health and safety of such employes.

The court will not hold that an act is not within the police power of the state unless it is so clearly without as to remove every reasonable doubt that it is.

If the power of the legislature to pass the law is conceded, it cannot be said in this case there is any deprivation of liberty without due process of law.

While the powers of the national government consist of those delegated, those of the state government embrace such as are not forbidden.

The first clause of the fourteenth amendment to the constitution of the United States makes all persons described in it citizens of the United States, and of the state where they reside,—citizens of two distinct governments.

The second clause of the same section prohibits the state from denying to any person therein his privileges and immunities as a citizen of the United States. His privileges and immunities as a citizen of the state are left to the protection of the state.

The third clause of the section forbids the deprivation of life, liberty, or property, except by virtue of valid laws. If the state law in this case was valid, the process was valid.

The last provision of the section prohibits the denial by the state, to any person within its jurisdiction, the equal protection of the law. And a law may be limited to the dangers peculiar to a particular industry, without denying to any person the equal protection of the law. *State v. Holden*, 71; *Id.* 96.

**ELECTION—See BILLS AND NOTES, 4.**



## ENROLLED ACTS.

When the validity of a statute is questioned in a court of law the enrolled act of the legislature, duly signed, approved, and deposited with the proper custodian, is *prima facie*, but not conclusive, evidence of its constitutional enactment, and of what the law is. Per BARTCH, J. MINER, J., concurring. *Ritchie v. Richards*, 345.

ESTOPPEL—See BILLS AND NOTES, 4.

EVIDENCE—See CIRCUMSTANTIAL EVIDENCE; CROSS-EXAMINATION; SECONDARY EVIDENCE; VALUATION; DAMAGES, 2; BILLS AND NOTES, 1, 4; FRAUDULENT CONVEYANCES.

1. Where a plain picture or representation produced by the art of photography is verified as a correct representation of the locality at the time of the accident, it is admissible in evidence to enable the court or jury to understand and apply the established facts to the particular case. Such photographic scenes are admissible as appropriate aids to the jury in applying evidence, whether it relates to persons, things, or places. *Dedrichs v. Railroad Co.*, 137.
2. A witness who was not an expert was permitted to state his opinion as to a certain subject, calling for expert testimony, but upon cross-examination modified his statement by limiting it to the facts of the case, and as the facts in all probability would have produced the same effect upon the jury, and the evidence outside of the objectionable statement was ample to warrant the jury in returning a verdict against the defendant, *held*, that while it was improper for the witness to state his opinion, it was not, under the circumstances, prejudicial error. *People v. Burtleson*, 258.
3. On cross-examination an agreement was offered in evidence by the defendants, and excluded because they had not set it up in their answer. Afterwards it was set up in an amended answer, and admitted. *Held*, that its exclusion in the first instance does not constitute reversible error.

Where objections to certain questions have been erroneously sustained, and the information called for by the questions has been subsequently given to the jurors, the ruling will not be regarded as reversible error, unless there is a probability that such erroneous ruling prejudiced the case of the party ruled against. *Bank v. Burton-Gardner Co.*, 420.

## EVIDENCE—Continued.

4. If there was a substantial conflict in the evidence as to whether defendants, or either of them, caused the prosecution to be commenced, and as to whether the plaintiff made the threats, and as to whether they, or either of them, had a reasonable fear that the crime threatened would be committed, or if there was room for a difference of opinion among reasonable men as to the existence of those facts, it was error to instruct the jury to find for the defendants.

Before finding against any of the defendants, the jury were required to believe from a preponderance of the evidence that they caused the prosecution, and that they did not have reasonable cause to believe that plaintiff made the threats, or that they did not have a reasonable fear that the crime threatened would be committed. If there was room for difference among reasonable men as to the existence of those facts, the evidence should have been submitted to the jury.

Probable cause for a criminal prosecution is equivalent to reasonable cause, and consists of facts in the mind of the prosecutor sufficient to lead a person of ordinary caution to believe that the party to be prosecuted is guilty,—as applied to this case, that the offense was threatened by Annie Johnston as stated, and that there was just reason to fear that the crime threatened would be committed.

The plaintiff offered to prove by a witness that defendant Rowe said "that, when plaintiff opposed his men, he directed defendant Meaghr to commence the prosecution, so that he could construct the ditch through the land, and that he also said that, if plaintiffs would promise to let the ditch be constructed peaceably through the land, he would stop the prosecution." *Held*, that the rulings of the court sustaining an objection of defendants to the offer was erroneous; that it was competent, relevant, and material, as against defendant Rowe. *Johnston v. Meaghr*, 426.

5. T. & K. were contractors, who built a house for S., upon which a certain sum of money was due on a certain day,

**EVIDENCE—Continued.**

and the same assigned for a valuable consideration to McC., subject to a deduction of any amount that might be a valid lien to subcontractors or material men. In a suit by McC. against S. for the amount assigned, *held*, that evidence of a prior assignment by T. & K. of portions of the fund to the subcontractors was properly excluded where it appears that T. & K. retained control of the fund and power of revocation until duly assigned to McC.

*Held*, also, that declarations by T. & K. in disparagement of title, made before assignment to McC., are admissible against him, and that it was error to exclude such declarations.

*Held*, that it was not error to exclude testimony of the architect as to the market value of material furnished for the house, the relation between the market value and the contract price not having been shown.

Testimony of a witness was rightly excluded where it was based solely upon a monthly statement not made by the witness, and of which he had no information, and neither the statement nor the books from which it was taken being offered in evidence.

After the books of M. & Co., one of the subcontractors or material men, were in evidence, it was competent to show that these books did not contain an account of all the material furnished by them to the contractors for S.'s house, as also a bill for glass, in the handwriting of the witness, sent to T. & K., the witness testifying that the glass went into the house in question, said bill should have been admitted in evidence with the other testimony for what it was worth, and it was prejudicial error to exclude it.

After showing that all of certain material in the house was furnished by M. & Co., it was error not to admit testimony of the architect as to the quantity of such material in the house. *Held*, also, that the testimony that the material was not paid for as delivered should have been received in evidence. *McCornick v. Sadler*, 468.

**EXCEPTIONS.**

It is a uniform rule that general exceptions to the admission of evidence are unavailable to parties making them, either on

**EXCEPTIONS—Continued.**

motion for new trial or appeal. The particular grounds of the objections must be stated, so that the trial court may understand the nature of the objection before passing upon it. *Culmer v. Clift*, 286.

**EXECUTION AGAINST A COUNTY.**

K. brought suit against Emery county for services, and obtained judgment before a justice of the peace, and afterwards levied execution on property of the county, and sold it. Emery county then commenced suit against K. and the sheriff for conversion of the property. *Held*, that a county is one of the political divisions of a state, and is clothed with certain political power of government of its local affairs.

Section 3419, Comp. Laws Utah 1888, giving a party in whose favor judgment is rendered a right to execution; and subdivision 10 of section 3429, exempting certain classes of property from execution against a county,—cannot be extended so as to include the right to levy an execution against the property of the county, state, or municipal organization, in the absence of a statute expressly granting such right in express terms.

Under section 199, p. 307, Comp. Laws Utah 1888, a judgment against a county, when duly filed, becomes an audited claim against said county; and plaintiff, in case of failure from lack of funds or refusal to pay the same, can resort to his writ of *mandamus*. *Emery County v. Burreson*, 328.

**EX POST FACTO LAW—See JURY.****FALSE IMPRISONMENT—See PLEADING, 1.****FEEs.**

1. The state is not required to pay mileage and attendance of jurors in civil cases. Section 166, p. 571, Sess. Laws 1896, so far as it provides for an itemized statement "for mileage and attendance of grand jurors, for mileage and attendance of petit jurors engaged in the trial of cases in the district courts, and for mileage and attendance of witnesses summoned by or on behalf of the state in criminal cases in the district court," must be governed in its interpretation by subdivision 5, § 94, p. 548, Sess. Laws 1896; subd. 7, § 118, p. 555, Id.; subd. 4, § 165, p. 571, Id.; and section 151, p. 567, Id. *Salt Lake County v. Richards*, 142.

**FEES—Continued.**

2. Under sections 1 and 2 of article 21 of the constitution of Utah, and the enactment of the legislature passed in pursuance of the said constitutional provisions (chapter 16, p. 89, Sess. Laws 1896), making it the duty of the county clerk to pay all fees collected by him in the district court in criminal and civil cases, except probate fees, into the state treasury, said payment should begin as provided by law on the 1st day of April, 1896, and continue quarter-yearly thereafter, and include all fees collected from and after the admission of the state into the Union, January 4, 1896; and there is no ambiguity or uncertainty in these provisions of the constitution or laws of the state, and no valid reason for not enforcing them.

Under section 4, c. 58, p. 162, Sess. Laws 1896, the failure of the county clerk to pay into the state treasury the fees collected by him in the district court in criminal and civil cases, except probate fees, after an account has been stated with him, and a mand made, entitled the state to charge said clerk 25 per cent damages on the amount delinquent, and interest at the rate of 10 per cent per annum, from the time of the failure to pay.

The fact that the county clerk, by order of the board of county commissioners, paid the amount due the state to the county treasurer, does not release the clerk from his liability under the law; nor is it necessary in such a case that the petition for a writ of *mandamus* should make the county treasurer a party defendant to this action, since he is a stranger to the proceedings.

It is the duty of the state auditor to examine the accounts of state and county officers, and become satisfied that the accounts rendered are correct, and that the fees provided by law to be collected and paid to the state treasurer by such officers are collected, reported, and paid. If such fees are not paid as provided by chapter 58, p. 159, Sess. Laws 1896, the auditor should institute proper proceedings for the payment of the same to the state treasurer.

*Mandamus* is a proper remedy in such cases. *State v. Stanton*, 180.

**FELLOW SERVANT—See NEGLIGENCE.**

Where the negligence of the employer and that of a fellow servant combine to produce an injury to a servant, the em-

**FELLOW SERVANT—Continued.**

ployer will be liable in damages to the injured servant.  
*Wright v. So. Pac. Ry. Co.*, 383.

**FINAL JUDGMENT—See APPEAL, 1, 2.****FINDINGS OF FACT.**

1. "The appellate court will not disturb the verdict of a jury on the findings of any essential fact by the court, unless it can say that such finding or verdict is clearly against the weight of the evidence." *Darke v. Smith*, 35.
2. *Held*, also, that a finding of fact made upon conflicting evidence will not be disturbed if there is evidence to sustain it. *Silva v. Pickard*, 245.
3. Where a fact is found outside of any issue, it is nugatory and of no effect, and cannot be considered as supporting the judgment.

A finding of fact on a material issue should be express and distinct, whether it be as to an issue made by the denial of an allegation in the complaint, or by a denial presumed by law of an averment in the answer.

When the facts are found, it must affirmatively appear therefrom that they support the judgment, or else the judgment will be subject to attack on appeal. *Maynard v. Ins. Association*, 458.

**FINDINGS OF REFEREE—See REFEREE.****FOURTEENTH AMEND. U. S. CONST.—See EIGHT-HOUR LAW.****FRAUD.**

An expression of opinion, estimate, or judgment of the value of property, even if false, does not ordinarily constitute actionable fraud. But a willful misrepresentation by a vendor affirming that the rental from property exchanged was greater than it was, when relied upon by the vendee, is an actionable fraud.

So a willful representation by an owner, in the exchange of real estate, that the property exchanged was high and dry, and located in a particular place, which representation was relied upon by the purchaser as true without inspection of the premises, but which was false, and which operated to the purchaser's injury, is an actionable fraud. *Hecht v. Metzler*, 408.

## FRAUDULENT CONVEYANCES.

When there is no testimony offered by the plaintiff, in his affirmative case, tending to establish a *prima facie* case of fraud in the alleged sale of property with intent to defraud creditors, a motion for nonsuit should be granted. Fraud cannot be presumed from mere suspicious circumstances, but must be proved. Testimony offered held insufficient to make a *prima facie* case. *Petrovitzky v. Brigham*, 472; *Ensign v. Fisher*, 477.

GUARANTY—See *BILLS AND NOTES*, 4.

HÆC VERBA—See *COMPLAINT*, 2.

## INDICTMENT.

Defendant was found guilty of an assault with intent to do bodily harm, under an indictment of an assault with intent to murder, and excepts to the sufficiency of the indictment, and to the charge to the jury. The indictment alleges that defendant "did unlawfully assault one S. with a deadly weapon, to wit, a revolver, loaded with powder and leaden bullets, which he, the said Frank McDonald, then and there held in his hands, and then and there tried to discharge upon and into the body of the said S., with the intent him, the said S., to then and there kill and murder." Where the offense is described in the statute in the terms, "Every person who assaults another with intent to commit murder" (Comp. Laws 1888, § 4471), the words "with malice aforethought" are not necessary in the indictment, as the word "murder" sufficiently described the crime. From the description the defendant and the court could understand the offense charged, and the defendant's conviction of it can be pleaded in bar of another prosecution for the same crime.

By statute (section 4488, Comp. Laws of Utah 1888), the crime is defined as follows: "Every person who, with intent to do bodily harm, and without just cause or excuse, or when no considerable provocation appears, or when the circumstances show an abandoned or malignant heart, commits an assault upon the person of another, with a deadly weapon, instrument or other thing, is punishable," etc. The allegations in the indictment that the assault was unlawful, and that it was done with intent to murder, exclude the existence of "just

## INDICTMENT—Continued.

cause" or "excuse" or "considerable provocation" as clearly as the words themselves would have done, and their use in the indictment was unnecessary under the above section.

It was not necessary for the court, in its charge to the jury, to use all the words in the description of the statutory definition; hence the words "without just cause or excuse" were sufficient, without adding thereto the words "or when no considerable provocation appeared."

*People v. Fairbanks*, 7 Utah 8, overruled. *State v. McDonald*, 173.

## INHERITANCE—See PRESUMPTION.

## INJUNCTION—See RESTRAINING ORDER.

The foundation of the jurisdiction in a court of equity to issue an injunction in aid of a trespass is the probability of irreparable injury, the inadequacy of pecuniary compensation, or the prevention of a multiplicity of suits.

It is not enough that the injury complained of is merely nominal, theoretical, or is apprehended, even though an action at law might be maintained; but, to justify the interposition of this summary power of injunction of a court of equity, there must be a cause to fear substantial, serious, and irreparable damage, for which courts of law would furnish no adequate relief, and the complaint should show facts to justify this conclusion.

Courts of equity will not ordinarily exercise this summary and extraordinary power when substantial justice can be done by courts of law, or by such other means as the court may exercise in order to prevent injustice during the interval preceding a final hearing on its merits.

The mere construction of a ditch across barren, rocky, uncultivated, and comparatively valueless land is not, of itself, an irreparable injury.

Injunctions are not usually granted to restrain a trespass, merely because it is such, without showing the property trespassed upon has some peculiar value that could not admit of due recompense, or that it would be destroyed by repeated or continuous acts of trespass.

The digging of a trench and pipe line across plaintiff's lots, which are alleged to be barren, rocky, vacant and compara-



**INJUNCTION—Continued.**

tively valueless, and when no great appreciable damage will be done by acts threatened to be continued, and it appears that the defendant is solvent and able to respond in damages, and it also appears that the title of the plaintiff in the property is in dispute, because of condemnation proceedings begun under the statutes, is not such an irreparable injury as to justify the extraordinary remedy by injunction, when taken in connection with the facts in the case. Ordinarily, this remedy by temporary restraining order will not be exercised when the right of the plaintiff is doubtful, and has not been settled by law, or where the remedy at law is adequate, or the title in question is in dispute.

Where, in such a case, it appears that the continuance of a temporary restraining order, to the hearing, may work great injury to one of the parties, without corresponding benefit to the other, the restraining order should be set aside. *McGregor v. Mining Co.*, 47.

**INTENT.**

In determining the question of a nuisance under the statute, the motive or intent with which the act complained of was committed cannot be considered. *People v. Burtleson*, 258.

**INTERLOCUTORY ORDER—See APPEAL, 1.**

**INTERVENERS—See COMPLAINT, 1.**

**IRRIGATION.**

The Jordan Irrigation Company entered into a contract with one Little whereby the latter transferred his title to a certain dam and canal, and granted a right of way through his land for said canal, to the irrigation company, in consideration that it would permit Little to water from the canal, which the company enlarged, 200 acres of his land. The plaintiff herein became the legal successor of the irrigation company, and defendants became successors to Little. Defendants took the water from the canal at six different places, but not subject to the direction and control of the water master. *Held*, that, assuming the land to be undulating, said defendants might take the water from the canal in said number of different places, if convenience and necessity so required, and that defendants were not subject, like stockholders, to the control

## IRRIGATION—Continued.

of the water master, but should follow the directions of the water master, as far as they may be according to the agreement.

As it did not appear by the weight of evidence that Little agreed to contribute proportionately with the stockholders in keeping the canal cleaned and in repair, his successors were not bound to do so. *Irrigation Co. v. Little*, 42.

## JUDICIARY.

The courts have power to declare any act of the government, in any of the departments, which violates the constitution, to be utterly void; and, in exercising this function in regard to an act of the legislature, they do not trench upon the domain of the legislative department. Per BARTCH, J. MINER, J., concurring. *Ritchie v. Richards*, 345.

## JUDGMENT.

A judgment must find its support in the actual state of facts ascertained and reported by the judge in his findings, or fail. No aid can be derived from facts not embodied in the findings. *Walley v. Deseret Nat. Bank*, 305.

JUDGMENT OF MAGISTRATES—See BONDS TO KEEP THE PEACE.

JUDICIAL NOTICE—See ENROLLED ACTS.

JURY—See VERDICT.

The description of the offense in the indictment included murder in the first degree, as well as in the second; but the crime was characterized as murder in the second degree, and the record showed that the defendant was actually tried for and convicted of that offense. *Held*, a trial by eight jurors did not violate section 10 of article 1 of the State Constitution, nor did such trial by eight jurors violate section 7 of the same article, which declares that "no person shall be deprived of life, liberty or property without due process of law."

Section 10 of article 1 of the constitution of Utah, which declares that "in courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors," is not in conflict with article 6 of the amended constitution of the United States, wherein it says that "in all criminal prosecutions the accused shall enjoy the right to \* \* \* a trial by an impartial jury

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## JURY—Continued.

of the state and district wherein the crime shall have been committed." The last article does not apply to trials under state laws.

Nor is section 10 of the state constitution repugnant to the first section of the fourteenth amendment of the federal constitution. The first clause of that section makes all persons born or naturalized in the United States, and subject to its jurisdiction, citizens of the United States, and of the state wherein they reside; and the second clause, which declares that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, has no application to jury trials under state laws in state courts. It does not refer to the privileges or immunities of the individual as a citizen of the state; it refers to the privileges and immunities of the individual as a citizen of the United States.

Nor does section 10 of the state constitution conflict with the third provision of section 1 of article 14 of the federal constitution, which declares that no state shall "deprive any person of life, liberty or property, without due process of law." That provision left the power with the people of the state, by a constitutional provision, to reduce the number of jurors for the trial of a cause in the state courts from 12 to 8. The defendant was tried by 8 jurors on April 7, 1896, upon an indictment charging him with murder in the second degree, and convicted. The offense was committed on the 22d day of September, 1895, and the provision of the state constitution reducing the number of jurors from 12 to 8 took effect on January 4, 1896. *Held*, that the change did not deprive the defendant of a substantial right, and that the constitutional provision making the change was not *ex post facto* and void. *State v. Bates*, 293.

## LEGISLATIVE JOURNALS.

Courts take judicial notice of legislative journals required to be kept by the constitution. Such journals possess the character of public records, and the entries therein contained constitute evidence which courts may consider in determining the question of the constitutional enactment of a statute. Per BARTCH, J. MINER, J., concurring.

Where it affirmatively appears upon the legislative journals, or either of them, that in passing an act the legislature disre-

## LEGISLATIVE JOURNALS—Continued.

garded a mandatory provision of the constitution, the court is justified in holding the act unconstitutional and void; but, where journals are merely silent as to the subject-matter under investigation, the court will presume that the legislature acted in accordance with its delegated power, and will hold the act valid, unless an omission of some matter which the constitution expressly requires to be entered thereon be shown by such journals, or either of them. Per BARTCH, J. MINER, J., concurring. ZANE, C. J., did not concur in holding that a law duly signed by the presiding officers of the respective houses, approved and signed by the governor, and filed in the office of the secretary of state, is not conclusive evidence of its passage, under a constitution which does not require the yeas and nays to be entered on the journals. *Ritchie v. Richards*, 345.

## LESSOR'S LIEN.

The deceased, in his life-time, occupied a building of the Eccles Lumber Company as a lessee from month to month. Thirty-four days after the death of the lessee, when the occupancy ceased, the lessor instituted proceedings before a justice of the peace for \$270 rent, claiming the benefit of a lien under section 1, of the act of March 8, 1894 (Sess. Laws, p. 128), which provides that the lessor "shall have a lien for the rent due upon all the property of the lessee not exempt from execution, as long as the lessee shall occupy the leased premises, and for thirty days thereafter." *Held*, that it was error for the court to decree that the lessor's claim was superior to all other claims, when the total amount of the estate was only \$567.30, and that the estate, being less than \$1,500, should have been set apart, under section 4118, Comp. Laws 1898, for the use and support of the widow and minor children of deceased.

Where the proceedings to enforce a lessor's lien are not instituted until after the time limited by the statute, the lien is gone, and thenceforth the lessor's claim possesses no superiority over that of any other person. *Stone's Estate*, 205.

LIEN—See LESSOR'S LIEN; MECHANIC'S LIEN, 1, 2.

## LIMITATIONS UPON THE LEGISLATURE.

The limitations and restrictions contained in article 6, §§ 14, 22, 24, and in section 8, art. 7, of the constitution of this state,

**LIMITATIONS UPON THE LEGISLATURE—Continued.**

respecting the enactment of laws, are mandatory and binding upon the legislature. The mandatory provisions of the constitution are conclusive upon all departments of government. Per BARTCH, J. MINER, J., concurring. *Ritchie v. Richards*, 345.

**LIQUOR LICENSE.**

Under chapter 52, p. 57, Sess. Laws 1892, defendant issued plaintiff a license to retail liquors, and after a quarter's license had been paid, and within a month after its issuance, revoked the same without previously having preferred charges against the plaintiff, or having cited him to appear and show cause why the license should not be revoked; the plaintiff having, however, been notified by the mayor of the city of the intention of the defendant to consider the matter of his license, and that he might attend the meeting of the city council, and be heard, if he desired. *Held*, that the revocation, without preferring charges against the licensee and giving him an opportunity to be heard, was unlawful and void.

Where a thing is to be done for cause, in the exercise of discretion, the law intends a sound discretion, and that the action be based on the merits of the case, as shown by the facts in relation to it. *Pehrson v. Ephraim City*, 147.

**MALICE**—See **INDICTMENT**.

**MALICIOUS PROSECUTION**—See **PLEADING**, 1.

**MANDAMUS**—See **FEES**, 2; **EXECUTION AGAINST A COUNTY**.

**MASTER AND SERVANT**—See **EIGHT-HOUR LAW**.

**MECHANIC'S LIEN**—See **WAIVER OF**.

1. Plaintiffs, as sub-contractors, pursuant to the act of the territorial legislature, approved March 12, 1890, filed and served notice of intention to claim a lien on property owned by appellant, and brought suit to foreclose the lien, making no averment in the complaint of the exact amount of the contract between the owner and the original contractor, nor of the payments made under such contract, the same not being of record. *Held*, changing the rule laid down in *Teahen v. Nelson*, 6 Utah 363, that in cases where the original contract is not of record it is not necessary in the pleadings to make

## MECHANIC'S LIEN—Continued.

avermments of the exact amount of such contract, nor is the sub-contractor required to make positive averments of the payments made under the original contract.

The doctrine laid down in *Morrison v. Carey-Lombard Co.*, 9 Utah 70, as to when such liens attach, is here affirmed. *Morrison v. Inter-Mountain Salt Co.*, 201.

2. Defendant Clift entered into a contract with Nink and others for the construction of a certain building. Plaintiff and others furnished materials for said building, and assignments of the claims arising under the mechanic's liens were made by the others to plaintiff, who brought this suit to foreclose them. Clift filed an answer, in which he set up payment of \$19,082, to the contractor Nink, the full contract price except \$2,727, which he held for the benefit of the contractor, sub-contractors and material men, as they might prove their right thereto. This answer was filed September, 1891; and on May 19, 1894, defendant Clift filed an amended supplemental answer, claiming that the contract had not been completed as agreed, and claimed damages in the sum of \$5,870, but did not waive or change any part of the original answer. Judgment and sale of the property were ordered to satisfy the several mechanic's liens, which were assigned to plaintiff, aggregating \$2,108.25.

Where the allegations of the complaint state that Culmer Bros., at the request of Clift and his architects C. & K., furnished materials, and the lien filed in proof states that the material furnished was in pursuance of a contract made by Culmer Bros. with B., C. & K., and N., who were the principal contractors employed by Clift, the variance is not such as to mislead the appellant, and therefore within sections 3252, 3253, Comp. Laws 1888, and section 14, p. 27, Sess. Laws 1890.

It was competent for the different parties having claims for material to assign (under section 28, c. 80, p. 31, Sess. Laws 1890) their claims to plaintiff, for the purposes of this suit.

The court properly deducted the amount (\$1,100) found due the defendant Clift as damages, and also properly added interest from the time of the date of the several liens; that being the time when the several sums should have been paid.

It was not necessary to file liens before the completion of the contract, and the law was complied with if filed within 40 days after the materials were furnished and labor performed.

**MECHANIC'S LIEN—Continued.**

*Morrison v. Cary-Lombard Co.*, 9 Utah 70; *Lumber Co. v. Partridge*, 10 Utah 322, construing the lien law of 1890.

The fact that the liens do not cover all the premises owned by Clift, upon which the buildings were erected, does not affect the validity of the liens filed. *Culmer v. Clift*, 236.

**MILEAGE—See FEES, 1.****MINES.**

Defendants having taken possession of plaintiff's mine with its consent, and having worked it and sold ores extracted, and having received the proceeds, believing they had a right to, upon a decree returning the mine to the owner such defendants should be allowed to retain the reasonable cost of extraction, expenditures of sampling, transportation and sale; and, in addition, they should be compensated reasonable expenditures for its preservation, development, and permanent improvement, to the extent its value was enhanced thereby. *Wasatch Min. Co. v. Jennings*, 286.

**MORTGAGE—See SUBROGATION, 1, 2; CONTRACT.**

Plaintiff sold certain property to defendant, who gave therefor his promissory notes, secured by a mortgage on the same. The defendant then sold the property to D, subject to the mortgage, and D sold it to C, under like conditions. Neither D nor C assumed or agreed to pay the mortgage, but the interest on the notes was paid by them. The time of payment of the notes was extended by the plaintiff, the mortgagee, without the knowledge or consent of the defendant, the mortgagor. The property was at all times, up to the maturity of the notes, worth the full amount of the mortgage, but declined greatly in value thereafter, and was worth less at the end of the time to which payment had been deferred than the mortgage. When the property was sold on a foreclosure, and the sheriff's sale showed a deficiency, plaintiff claimed a deficiency judgment against defendant, which was denied by the court: *Held* that, by the right of subrogation, the mortgagor, after conveyance, and after maturity of the mortgage, might pay the debt, and secure his safety upon the land, and that when the mortgagee and grantee extended the time of payment, without the knowledge and consent of the mortgagor they took away the latter's right of subrogation, and imposed

**MORTGAGE—Continued.**

upon him a new risk, not anticipated, and never consented to. The mortgagor stood to the end, as he was in the beginning, the sole principal debtor, but, on account of the depreciation of the value of the mortgaged security, liable only to the extent of the land, which depreciated during the time of the extension of the notes. The extension of time took away his right of subrogation, and discharged him to the extent of the value of the land. Being once discharged, he could not again be made liable. From the time of the extension, the risk of future depreciation fell upon the creditor, and he assumed the risk of obtaining his money out of the land; and defendant was released from liability for the deficiency reported due on the mortgage. *Bunnell v. Carter*, 100.

**MORTGAGE FORECLOSURE.**

The plaintiffs held two mortgages, under two separate debts, on the same property. Judgment without sale of the property was had on the first mortgage, and then both causes were consolidated before the trial in the second suit, without objection. *Held* that, while the plaintiffs ought to have foreclosed both mortgages in one suit, the lien of the mortgages foreclosed in the second was not lost by reason of the first suit.

Where a mortgagee brings two suits to foreclose two separate mortgages on the same property, when one would be sufficient, he will be allowed costs in one only. *Thompson v. Skeen*, 209.

**MUNICIPALITY—See SIDEWALKS.****MURDER—See JURY.****NEGLIGENCE—See CONTRIBUTORY NEGLIGENCE; FELLOW SERVANT.**

The plaintiff received the injury complained of while in the employ of defendant, and while acting in the capacity of switchman in defendant's yards. The engine used in moving the cars was operated without a fireman, the engineer performing the duties of fireman himself. This fact was known to the plaintiff, who continued to work without making any complaint to defendant or to any of its agents. The engine was defective and required more attention because thereof. Defendant had rules which required switchmen to give signals to the engineer, and to see that the signals were observed and obeyed before going between the cars, and to abstain from going



## NEGLECT—Continued.

between them while in motion, for the purpose of coupling or uncoupling them. But these rules were constantly violated, not only by the plaintiff but also by the yardmaster, as well as the other switchmen. On the occasion of the accident, the plaintiff gave the engineer the signal to stop, which was obeyed, and then went between the cars to pull the pin; but, being unable to do so, he stepped out, and gave the "slow back up" signal, and, without waiting to see if the signal was obeyed, went between the cars to uncouple them while in motion. The engineer, by a quick movement, bumped the forward cars against the back one. The plaintiff's foot was caught under the brakebeam. He then gave the signal to stop, which not being observed, he was dragged a distance of two or three car lengths until he fell when several trucks passed over and crushed his leg below the knee, causing the injury complained of. When the last signal was given, the engineer was in the act of replenishing the fire, and therefore failed to observe and obey it. Plaintiff's leg was amputated above the knee, and he has been unable to wear an artificial leg. Evidence was introduced tending to show that the accident would not have occurred had there been a fireman on the engine at the time of the accident. *Held*, that the non-suit was properly denied; that plaintiff's knowledge of the fact that defendant operated its engine without a fireman was not of itself sufficient to preclude a recovery; that such a result would not follow unless the want of a fireman caused the operation of the engine to be so obviously dangerous that a man of ordinary care and reasonable prudence would refuse to act as switchman. The plaintiff had the right to rely, at least to some extent, upon the judgment of the defendant's agents, who deemed it safe for the engineer to perform the work of a fireman.

An employé, as switchman, assumes the perils and risks ordinarily incident to such employment, including the hazards which observation would bring to his knowledge; but he does not assume the perils occasioned through the negligence of his employer, nor is he bound to anticipate and comprehend all the perils to which he might possibly be exposed because of a want of a sufficient number of employés to perform the service in safety.

## NEGLIGENCE—Continued.

The employer has a right to adopt rules for the conduct of business and the safety of the employé; but, in order that such rules may avail the employer in a suit for damages for injuries resulting from a breach thereof, they must not only have been known to the employé, but also their observance must not have been waived by the employer.

Where a certain rule of the employer, though established for the safety of the employé, has been habitually disobeyed since its inception, or for a long period of time, in the presence or to the knowledge of the employer, without an attempt to enforce it, or has been disregarded in such manner and for such length of time as to raise the presumption that it was done with his knowledge and approval, the rule will be regarded as abrogated or waived.

The question whether, under all the circumstances surrounding the accident, the employé was guilty of negligence which was the proximate cause of the injury, was one of fact for the jury, and not one of law for the court.

Whether the employé, at the precise time of the accident, was exercising such care as a reasonable and prudent man, having due regard for his own safety, would have exercised under similar circumstances, or whether he was guilty of contributory negligence in violating a rule of the employer, were questions of fact for the jury to determine.

Evidence of a customary disregard of the rule of a railroad company by its employés, with the knowledge and approval of the agents of the company, is competent as tending to show that the rule was abrogated or waived. *Wright v. So. Pac. Ry. Co.*, 383.

NEW TRIAL—See REFEREE.

NONSUIT—See WAIVER OF EXCEPTIONS, 1; FRAUDULENT CONVEYANCES.

NOTICE TO MUNICIPALITY—See SIDEWALKS.

NUISANCE.

Where a party so uses his property as to annoy, injure or endanger the comfort, repose, health, or safety of three or more persons, his acts are unlawful, and he is liable to prosecution under section 4566, Comp. Laws Utah 1888, even though he may be in pursuit of a lawful business, and conducting it in a reasonable and careful manner. *People v. Burtleson*, 258.

OFFICIAL SIGNATURE—See **BILLS AND NOTES**, 4.

PAROL EVIDENCE—See **BILLS AND NOTES**, 1.

PARTIES—See **CORPORATIONS**.

**PARTNERSHIP.**

One firm may become a partner in another firm, and in that event such partner will be treated as a constituent member of the new firm.

K. & Bro., as a firm, became a constituent member of the firm of M., K. & Co., whose members then were M. and K. & Bro., each having an equal interest in the new firm. Both firms were engaged in the same line of business. The new firm manufactured and furnished lumber in which K. & Bro. as a firm were dealing. Profits made by M., K. & Co. inured to the use and benefit of K. & Bro. In transacting the business of M., K. & Co., debts were legitimately created. To pay these obligations, a loan was obtained by M., K. & Co., with the agreement that K. & Bro. and M. should sign the note to be given for the loan, as sureties for M., K. & Co. K., one of the members of K. & Bro., signed the firm name to the note as such surety. *Held*, that the firm of K. & Bro. was bound by such signature.

The acts of one partner in relation to the partnership business will bind the firm. *McLaughlin v. Mulloy*, 490.

PHOTOGRAPHS—See **EVIDENCE**, 1.

PLEADING—See **CROSS COMPLAINT**; **MECHANIC'S LIEN**, 1; **DENIAL**; **COMPLAINT**, 1, 2.

1. The plaintiffs alleged that defendants maliciously and without probable cause commenced a prosecution against plaintiff Annie Johnston; that they falsely charged her with threatening to assault defendant Meaghr and others with deadly weapons; that a warrant issued, upon which she was arrested; that they unlawfully, maliciously, and without probable cause, imprisoned her, without any right whatever. No demurrer was filed. *Held*, after verdict and judgment, that the facts stated should be regarded as a count for malicious prosecution. Plaintiff cannot, in one count, rely upon false imprisonment, and malicious prosecution. The foundation facts on which

## PLEADING—Continued.

these causes rest differ. The gist of one is the malicious institution of a suit without probable cause. The gist of the other is the illegal and forcible invasion of an individual right to liberty.

The plaintiff cannot, in the same count, rely upon two or more distinct matters, each of which, independently of the other, amounts to a good cause of action.

While section 3126, 2 Comp. Laws Utah 1888, declares that "there is in this state but one form of civil action for the enforcement or protection of private rights and the redress and prevention of private wrongs," and while all distinctions as to forms of civil actions are abolished, the distinctions as to causes of action remain.

In construing pleadings upon demurrer the maxim is that everything shall be taken most strongly against the party pleading. If two meanings present themselves, the one shall be adopted most unfavorable to the pleader. But the rule applicable after trial is that, if two reasonable meanings present themselves, that shall be taken which supports the complaint or plea, not the other, which would defeat it. *Johnston v. Meagher*, 426.

2. *M.* was a member of the defendant association, and received an injury in June, 1893, which resulted in the loss of the sight of his right eye. One of the objects of the association is to transact the business of life and accident insurance. *M.* brought suit to recover on two of its policies, basing his action on a by-law which provides that "any member, while engaged in any lawful vocation, receiving any bodily injuries which will alone cause \* \* \* the total and permanent loss of one or both eyes, he shall receive the whole amount of his policy." This by-law was adopted on May 26, 1894, after *M.* received his injury. *Held*, that the by-law is not by its terms retroactive, and, considered by itself, does not include a case where the injury which caused the loss of eyesight occurred prior to its passage, there being no reference in the pleadings to any other by-law which would authorize the inference that the one in question was to apply to such a case. *Held*, further, that the finding of the court that another by-law was in existence, when there was no reference

**PLEADING—Continued.**

to it in the pleadings, was a finding of fact outside of any issue, and that such findings cannot be considered, although, if the by-law had been properly pleaded, it would have an important bearing in the determination of the case. *Maynard v. Ins. Association*, 458.

**PLEADING AND PROOF.**

It is error to grant a decree quieting plaintiff's title on proof of facts showing a right to specific performance simply.

Unless the findings embrace all the facts essential to the cause of action set up in the complaint, a decree for the plaintiff based thereon is erroneous. *Henneffer v. Hayes*, 824.

**POLICE POWERS—See EIGHT-HOUR LAW.****PRESUMPTION—See BILLS AND NOTES, 2; FRAUDULENT CONVEYANCES.**

In an instance under section 2677, Comp. Laws, where a testator failed to provide in his will for one of his children, the statute presumes that the omission was not intentional.

The presumption raised by the statute that the omission by a testator to provide for a child was not intentional may be rebutted by extrinsic evidence, whether of declarations of the testator or collateral facts. *Atwood's Estate*, 1.

**PRIORITY—See LESSOR'S LIEN.****PROBABLE CAUSE—See EVIDENCE, 4.****PROOF—See VALUATION.****RECEIVER—See CORPORATION.****RECORD IN TRIAL COURT.**

The trial court has the power to make the record of the case correspond with the actual ruling, notwithstanding an appeal may have been taken to the supreme court. *Wasatch Min. Co. v. Jennings*, 221.

**REFEREE.**

The findings of a referee, and a decree of the court thereon, upon a motion for a new trial entered within the time given by the statute, may be set aside by the court at a subsequent term.

**REFEREE—Continued.**

In an equity cause, the court may, upon motion entered in due time, vacate a decree, and treat a verdict of a jury or the findings of a referee as advisory, and make such findings as the evidence may warrant, and enter a decree thereon.

Where a case has been heard by a referee, the court may, upon motion for a new trial, or exception taken in due time, hear either, or he may require the motion or exception to be submitted in the first instance to the referee, but such submission will not deprive either party of the right to have such motion or exception afterwards decided by the court. *Wasatch Min. Co. v. Jennings*, 221.

**REMISSION OF DAMAGES—See RES ADJUDICATA, 2.****REPEAL.**

Comp. Laws of Utah 1888, § 4566, which defines a public nuisance, and denounces the annoying, injuring, or endangering the comfort, health, repose, or safety of three or more persons as a public nuisance, was not impliedly repealed by sections 4, 5, c. 63, Sess. Laws 1892, amending section 2264, Comp. Laws Utah 1888, relating to "befouling waters," since section 4566 relates to and was intended to denounce and punish public nuisances in general, and is applicable whenever a nuisance affects three or more persons, while sections 4, 5, of the act of 1892 relate only to, and were intended to denounce and punish the befouling of waters of any stream used for domestic purposes by the inhabitants of any city, town or village, and leave wholly unprotected all persons who are not such inhabitants, and since an act which might constitute a nuisance under the former law might not constitute an offense under the latter.

Where two statutes do not relate to the same subject, and are not enacted for the same purpose, they are not repugnant to each other. *People v. Burtleson*, 258.

**RES ADJUDICATA.**

1. This was a partnership settlement, tried before a referee, and taken to the supreme court of the late territory, where the question of the exclusion of certain testimony, and the sufficiency of the evidence, were passed upon. On a second trial the referee adhered to the decision of the territorial supreme court which on this appeal the appellant contends is not binding, because that court was not a court of last resort, inasmuch

## RES ADJUDICATA—Continued.

as the case might have been taken to the supreme court of the United States, the amount involved being over \$5,000. *Held*, that a decision of the supreme court of the Territory of Utah is *res adjudicata*, and that the principles and questions there adjudicated on an appeal are binding, and will not be reviewed as between the same parties and their privies on a subsequent appeal in the same case. The law so declared controls all further proceedings in the cause until the termination. *Silva v. Pickard*, 245.

2. Plaintiff in this action assigned to H. for the purposes of a suit thereon, his claim for damages against the defendant company for the killing of his horse. H. brought suit, and, in his complaint, stated two causes of action, in two separate counts; the first count being for the value of his own horse, which was also killed by the said defendant, and the second count for the value of this plaintiff's horse, by right as assignee. A general verdict was rendered in favor of H. on both causes, and judgment rendered thereon for one entire sum. Upon the hearing of a motion for a new trial, H. remitted a sum equal in amount to that claimed for plaintiff's horse, and the defendant afterwards paid the judgment. The assignment had been made an issue, and was declared valid. There was no appeal or reversal of the judgment. The defendant herein set up that judgment as a bar to this action. *Held*, that the plaintiff must be regarded as in privity with H. in the former action, and that he is estopped from again litigating the same claim against the same defendant.

If, in an action, a court had jurisdiction to render a judgment, and such judgment has never been reversed or modified, it is binding on the parties and their privies, and conclusive of the questions litigated; and, if the court has misapplied the law as to any question, the judgment must nevertheless stand until corrected in some appropriate way.

Where a party obtains a judgment for damages, and voluntarily, without specifying any purpose, remits a part thereof, he abandons his claim to the sum so remitted, and may not afterwards bring an action to recover such sum. Such remission has the effect of crediting the defendant with the amount remitted, on the judgment. *Hodson v. Ry. Co.*, 402.

**RESTRAINING ORDER—See INJUNCTION.**

Where the pleadings and affidavits on hearing for a temporary restraining order are such as to leave in doubt the quantity of water appropriated by or belonging to each party, and it does not appear with reasonable certainty that defendant had not acquired or did not own the water and mines referred to in the complaint, and no definite or certain amount of water is alleged to belong to the plaintiff, and it also appears that the allegations in the complaint and affidavit supporting it are substantially denied, and it is alleged that license was granted defendant to lay a pipe line over the land of plaintiff to the water in question, which is denied, and when the restraining order leaves in uncertainty the amount of water defendant was permitted to use, *held*, that the respective rights of each party are so uncertain and indefinite that the same cannot be safely determined from the conflicting affidavits and showing made.

When this state of facts exists, and it is apparent that the continuance of the restraining order until the hearing will work great injury to one of the parties, without corresponding benefit to the other, *held*, that the restraining order should not continue, if adequate protection to the parties until the final hearing can be had without it, by means of a bond of indemnity.

*Held*, also, that under the facts in this case a proper determination of the case can only be reached upon a trial, where the witnesses can be heard and examined in a way to sift their candor, recollection, and truthfulness.

STREET, District Judge, dissenting. *Mining Co. v. Mining Co.*, 57.

**REVOCATION—See LIQUOR LICENSE.****RULES OF EMPLOYER—See NEGLIGENCE.****SALES.**

A vendor delivered to plaintiffs enough wool at 9 cents per pound to pay a debt of \$505, which he owed them, and they moved it a considerable distance, to the opposite end of the shed, and stored it; and afterwards the vendor, upon an agreement with the plaintiffs, employed a man who owed him to haul the wool to the station, to be shipped in plaintiffs' names. *Held*, that this was *prima facie* evidence of sale, delivery, and



## SALES—Continued.

continuous possession, and that the court erred in instructing the jury to find for defendants on the ground that there was no evidence of actual delivery and continuous possession.

Under section 2837, Comp. Laws 1888, a sale of goods must be accompanied with delivery within a reasonable time, and followed by an actual and continuous change of possession. The change of possession must be actual, not constructive, or merely colorable; and it must be continuous, not merely a delivery and surrender back.

After a sale and delivery of the goods, the vendee may appoint the vendor his trustee to hold them, or his agent or employé to hold or dispose of them. *Everett v. Taylor*, 242.

## SECONDARY EVIDENCE.

"Where a written instrument is traced into the hands of a party, not within the state, secondary evidence is admissible to prove the contents of the instrument, and this without further showing that the original was lost or destroyed. In such case no notice to produce is necessary, and a copy of the instrument is competent evidence." *Dwyer v. Salt Lake City Mfg. Co.*, 339.

## SIDEWALKS.

Where the court, in beginning the charge, states the material allegations of the complaint and the admissions and denials of the answer, it is not error if it afterwards refers to them in general terms, by stating that the plaintiff should establish each of the material allegations of the complaint by a preponderance of the evidence, without restating them.

Where a court charges a jury that it shall take into consideration whether the sidewalk was in a central position or in the outskirts, and the amount of travel over it, it is not error if it at the same time charge the jury that it was the duty of the city to keep its streets and sidewalks over their entire length and breadth in good order and repair.

It is proper for a court to instruct the jurors that they might consider whether or not it was a common occurrence for a culvert to be out of repair, as it went to the question of notice to the officers of the city.

It is the duty of municipal officers having the oversight and care of streets and sidewalks to use all reasonable diligence to keep them reasonably safe for persons using them with reasonable care. *Scott v. Provo City*, 31.

## SPECIFIC PERFORMANCE—See PLEADING AND PROOF.

"When intention to execute the deed of gift is sufficiently proven, and possession is taken and held in pursuance of the promise by the promisee, and valuable improvements are made by the latter upon the faith of the transaction, courts of equity usually decree the specific performance of the promise." *Darke v. Smith*, 85.

## STATE AUDITOR—See FEES, 2.

## STATUTE OF FRAUDS.

The statute of frauds is not satisfied in a case of specific performance by a letter that has been lost, where its contents are testified to by the receiver, and the letter does not contain a description of the land in dispute with reasonable certainty. *Darke v. Smith*, 85.

## SUBROGATION—See MORTGAGES.

1. Page borrowed from Featherstone \$2,000, which was secured by mortgage upon land which was afterwards sold to Brown and Emerson for \$5,000. Brown and Emerson paid \$1,000 cash, and agreed to pay the \$2,000 mortgage thereon, and gave a purchase-money mortgage for \$2,000 back on the property to Page. Emerson afterwards paid \$1,200 on the last mortgage, and Brown, with the tacit agreement with Page that it should be a part of the old obligation, gave a new mortgage on his undivided half of the land for \$800, which was given as a purchase-money mortgage, and Page released the \$2,000 mortgage. Emerson had notice of the transaction. The \$800 mortgage was assigned to Featherstone, the plaintiff, who held both mortgages. After Featherstone had foreclosed the \$800 mortgage, and obtained title to the undivided half of the land, Emerson paid \$1,100, and tendered plaintiff the balance due on the \$2,000 mortgage that Brown and Emerson had jointly assumed, provided that plaintiff would assign to Emerson the \$2,000 mortgage. Plaintiff refused the tender or to make the assignment, but offered to assign the \$2,000 and the \$800 mortgage to Emerson, upon payment of the full amount due on both mortgages, which Emerson refused to do. *Held*, that Emerson was surety for Brown as to at least one-half of the two mortgages given and assumed by both; that the

## SUBROGATION—Continued.

equities of Featherstone, as assignee of the \$800 purchase-money mortgage given by Brown to Page, were superior to Emerson's right; that Emerson was not entitled to be subrogated, without having paid or offered to pay the \$800 mortgage; that, as between Brown and Emerson, both were bound to contribute towards the discharge of the common joint burden; that, when purchase money is the consideration of the instrument, it will continue to be the consideration of any other instrument, if expressed therein, executed by agreement in substitution of the old one, unless superior equities intervene, which have not in this case.

The release of the \$2,000 mortgage, which Brown and Emerson were both obligated to pay, on payment of \$1,200 by Emerson, and the giving of the \$800 purchase-money mortgage on one-half of the land by Brown to Mrs. Page, upon such release, coupled with the tacit agreement that such new \$800 mortgage should be a part of the former obligation, and the express agreement that it should be a purchase-money mortgage, with notice to Emerson, was for Emerson's benefit to the amount of \$800, and should not be used as a weapon in the hands of Emerson to defeat Mrs. Page, nor her assignee, who succeeds to her rights in the mortgage, from recovering the purchase price of the land sold, without first paying or offering to pay the same.

The property was the primary fund to meet the obligation of both, and Mrs. Page held the mortgage as a purchase-money mortgage, and transferred her right to the plaintiff, whose equities are superior to those of Emerson or Brown, until tender or payment of the entire debt arising from the purchase. *Featherstone v. Emerson*, 12.

2. A purchaser of mortgaged premises, who agrees to pay the mortgage as a part consideration for the purchase price, upon the representations of the grantor that there are no judgments or liens standing against the grantor or the property, who pays the outstanding mortgage under a mistake of fact, relying upon such representations, and after the payment and discharge of the mortgage, and the execution of the conveyance to the grantee, it appears that there was a judgment standing against the grantor, which was recovered subsequent to the date of the mortgage, and

**SUBROGATION—Continued.**

it also appears that the position of the judgment creditor had in no way been changed or altered in any reliance upon the release of the mortgage,—*held*, that the grantee will be subrogated to the rights of the mortgagee, and may have the land sold first in satisfaction of the amount the grantee paid to satisfy the mortgage and costs, and the balance derived from the sale to be applied to the payment of the judgment. *Held*, also, that when the legal rights of the parties have been changed by mistake or fraud, equity will restore them to their former condition, when it can be done without interfering with any new rights acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to either party. *Johnson v. Tootle*, 482.

**SURETY—See BILLS AND NOTES, 1; PARTNERSHIP.**

**TAXES—See COUNTY SCHOOL TAX.**

**TITLE OF AN ACT.**

The title of an act, expressed as follows: "An act relating to and making sundry provisions concerning elections," limits its subject to provisions concerning elections, and is sufficiently definite and certain, under section 23, art. 6, of the constitution of the state of Utah.

When the language of the title is, in terms limited to provisions concerning elections, provisions concerning appointments to office cannot be included in the law; but, if included, those concerning elections may stand, while those relating to appointments must fall, unless they are so dependent on each other that the former cannot be executed without the latter.

So much of section 5 of the act approved April 5, 1896 (Sess. Laws, p. 369, c. 125), as relates to elections, is valid; but the provisions of said section which relate to filling vacancies in certain offices by appointment are invalid, because in conflict with section 23 of article 6 of the constitution. Likewise, section 42 of the same act is void because in conflict with section 23 of article 6 of the constitution. *Ritchie v. Richards*, 345.

**TRESPASS—See INJUNCTION.**

**VACATING JUDGMENT—See APPEAL, 3.**

VARIANCE—See MECHANIC'S LIEN, 2.

### VERDICT.

In civil cases nine jurors may find a verdict. *Scott v. Provo City*, 81. Overruled. See *Am. Pub. Co. v. Fisher*, 17 Sup. Ct. Rep. 618.

VESTED RIGHTS—See APPEAL, 1, 2.

### VILLAGE.

Where it appeared from the evidence that a settlement consisted of 14 families, each family containing about 5 persons; that these reside along a stream, the distance from one extreme end of the settlement to the other being about two miles and a half, some residing within 40 rods of each other, and others being distant about a mile or more; that their chief occupation was farming; that the settlement contained a school district, a district school, and a post office; and that the nearest settlement to the north was distant about 15 miles, to the west about 12, and to the south about 6 miles,—it was not error in the court to instruct the jury that as a matter of law such a settlement was a village, within the meaning of the statute (chapter 63, p. 70, Sess. Laws 1892).

VOIDABLE CONTRACT—See BILLS AND NOTES, 4.

### WAIVER OF EXCEPTIONS.

1. The offer of evidence after the overruling of a motion for nonsuit is not a waiver of the exception taken to the order overruling such motion, under Sess. Laws 1894, p. 42. *Petrovitzky v. Brigham*, 472.
2. The offer of evidence after the overruling of a motion for nonsuit is not a waiver of the exception taken to the order overruling such motion, under Sess. Laws 1894, p. 42. *Ensign v. Fisher*, 477.

### WAIVER OF MECHANIC'S LIEN.

Where a mechanic stipulates with the vendee of premises that he will look to some other person for services performed thereon, or that all such claims have been paid, he thereby waives his lien on such premises. A mechanic's lien is a privilege conferred by statute, and ordinarily may be waived by express agreement of the party in whose favor it exists. *Dwyer v. Salt Lake City Mfg. Co.*, 339.

WIDOW—See LESSOR'S LIEN.

WILL—See PRESUMPTION.

WITNESS.

1. The devisees, under the law of 1894, amending subdivision 3, § 3877, Comp. Laws, 1889, are not competent witnesses against an omitted child. *Atwood's Estate*, 1.
2. A party to an action to establish his interest in the estate of a deceased person cannot testify, in his own behalf, to any conversation or transaction equally within his own knowledge and the knowledge of the person since deceased, when the opposite party sues or defends as heir of such deceased person. *Henneffer v. Hayes*, 324.

*Atwood's Estate*

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